89- 1451

Supreme Court, U.S.
FILED
FEB 26 1990
JOSEPH F. SAPNIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

EVELYN I. LIVENGOOD,
Petitioner,

VERSUS

ROLLIE D. THEDFORD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

LARRY SIZEMORE, INC., P.C.
By Larry Sizemore, Attorney
OBA #8283
1400 S.W. 89th Street
Oklahoma City, OK 73159
(405) 691-3353

Feb 23
~~January 30~~, 1990

QUESTIONS FOR REVIEW

1. Does the Fifth Amendment of the U.S. Constitution still protect a "citizen" from fraudulent, unlawful and unconstitutional acts by government management agents, even though such "citizen" be a 30-year career employee of government serving in a probationary status after promotion to a supervisor?

2. Does a U.S. "citizen" still have access to a U.S. Article III court for redress and recovery for constitutional wrongs done by government management agents, even though such "citizen" be a 30-year career government employee serving in probationary status after promotion to supervisor?

3. Is a "citizen" government employee of 30-year satisfactory service, even though serving in probationary status after promotion to supervisor, still to be classed as an "all employees" under Merit System Principles that "shall receive fair and equitable treatment in all aspects of personnel management...with proper regard for...constitutional rights" [5 U.S.C. §2302(b)(2)]?

4. Is a government career employee of 30-year satisfactory service still entitled to statutory benefits as an employee named in a statute for such benefits, and if so entitled, can the employee be deprived of such benefits merely because such employee is serving on probationary status after promotion to a supervisor?

5. Can unfounded, fraudulent and unlawful allegations, even when proven untrue, still be used by government management personnel against a government employee serving in a probationary status after promotion to a supervisor in order to reduce such employee to a status that deprives the employee of all statutory or constitutional rights

without the employee having any opportunity to refute the fraudulent allegations [5 U.S.C. §4303(f)]?

6. Does Congress have authority to deprive a U.S. "citizen" government employee of a constitutional claim which comes to such "citizen" directly under the constitution?

7. Does Congress or an Article III court have authority to deprive a U.S. "citizen" government employee the right to pursue a constitutional claim in an Article III court, as well as the constitutional right to appellate jurisdiction of the Supreme Court, when that "citizen" is one of the "we the people of the United States" who ordained the Article III courts in order to protect the "citizen" against the abuse or misuse of power, to which the legislative and the executive branches of government aspire, when the Article III courts have received by that "citizen" all judicial power and do not have to aspire to any additional power since the Article III courts have it all and there is no more to obtain, and thereby have the power and the responsibility to protect "citizens" from the other branches?

8. Can Congress or Article III courts force a "citizen" who has a legitimate constitutional claim for the deprivation of a right coming to that citizen directly under the constitution to attempt redress and recovery for such claim from a legislative agency or person, neither of whom have authority under the constitution to try such a claim since all judicial power is in the Article III court, and nothing in the constitution even indicates that any power is granted to any legislative body or person to try such a claim?

9. Does not Congress, in passing the statute, CSRA 1978, naming the person [the employee] to benefit by the statute and requiring

— fair and equitable treatment with proper regard for Constitutional Rights [5 USC §2301(b)(2)],

— education and training [5 USC §2301(b)(7)],

— training to increase proficiency of employee with head of agency to establish [5 USC §§4101, 4103],

— establish appraisal system as basis for training [5 USC §4302(a)(3)],

— to assist employees in improving unacceptable performance [4302(b)(5)], and

— reducing employee in grade, but only after opportunity to demonstrate acceptable performance [5 USC §4302(b)(6)]

declare that such employee, in any position to which promoted, even on probation, has a property interest in such position and desires such employee to stay in such position which position cannot be taken away from the employee without due process of law, until management has met all requirements of the statute and the Constitution?

10. When requirements of Question 10 are breached by Agency management personnel, does not such breach become a deprivation of such rights and place the employee under the Fifth Amendment of the United States Constitution with entitlement for hearing before and redress and recovery from an Article III court, even if such deprivation also be a prohibited personnel practice, [5 USC §2302(b)(11)], by violating any law, rule or regulation implementing or concerning Merit System Principles, [5 USC §2301(b)(2)], by not having proper regard for constitutional rights, [5 USC §2302(b)(2)], which the head of the agency is required to prevent, [5 USC §2302(c)], and prohibited personnel practice cannot be sustained by Merit System Protection Board, [5 USC §7701], nor on judicial review to Court of Appeals for

the Federal Circuit, [5 USC §7703], when the statutory violations, for which there would be a course of action, can be merged into the constitutional claim, so that there is one cause of action and not two?

TABLE OF CONTENTS

QUESTIONS FOR REVIEW i

ORDERS FROM
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA xiv

ORDERS FROM
COURT OF APPEALS
FOR THE TENTH CIRCUIT xiv

OFFICIAL OPINIONS xv

JURISDICTIONAL STATEMENT xv

CONCISE STATEMENT OF
NATURE OF THE CASE 1

CONCISE STATEMENT OF FACTS 3

CHRONOLOGICAL STATEMENT 6

CHRONOLOGY OF EVENTS IN COURT LEADING TO
FINAL ORDER OF TENTH CIRCUIT COURT OF APPEALS
DATED AND FILED IN OFFICE OF
CLERK OF TENTH CIRCUIT ON DECEMBER 1, 1989 7

ARGUMENT 15

VIOLATION OF STATUTE
LEADING TO VIOLATION
OF CONSTITUTIONAL RIGHTS 15

TABLE OF CONTENTS CONTINUED PAGE

INAPPLICABILITY OF
SCHWEIKER V. CHILICKY, 56 U.S.L.W. 4767,
108 S. Ct. 2460, 101 L.Ed. 2d 370 (1988) 17

VIOLATION OF STATUTE
LEADING TO PROHIBITED PERSONNEL PRACTICE . . . 19

INAPPLICABILITY OF
BUSH V. LUCAS
103 S. Ct. 2404, 76 L.Ed.2d 648, 462 U.S. 367 (1983) 21

SPECIAL FACTORS AND ALTERNATIVE REMEDY 22

UNCONSTITUTIONALITY OF CSRA 1978 AND
UNCONSTITUTIONAL APPLICATION OF CSRA 1978 . . . 25

PRIOR COURT DECISIONS WHERE CONSTITUTION
NOT FOLLOWED OR COURT REVERSED ITSELF 28

THE DUE PROCESS CLAUSE
OF THE FIFTH AMENDMENT —
FROM WHERE DID IT COME? 30

AN EXAMPLE OF THE COURT
REVERSING ITSELF AFTER NEARLY
100 YEARS OF PRECEDENT 33

PRAYER FOR RELIEF 35

APPENDIX A 1
SSA Employee Performance Management
System — Performance Planning and Review
(Form SSA-1301) covering progress ratings,
Dated February 21, 1985 and June 19, 1985

TABLE OF CONTENTS CONTINUED PAGE

APPENDIX B 2
SSA Employee Performance Management System Performance Appraisal (Form SSA-1300), covering performance period from June 28, 1985 to October 30, 1985, dated November 15, 1985, and November 18, 1985

APPENDIX C 3
Letter of Removal from Supervisory Hearing Assistant to Hearing Assistant, addressed to Ms. Evelyn Livengood from Marge Carmichael, Hearing Office Manager, and Rollie D. Thedford, Hearing Office Chief Administrative Law Judge, Concurring Official, dated December 18, 1985

APPENDIX D 7
Supplemental letter by Defendant, Rollie D. Thedford, Hearing Office Chief Administrative Law Judge, dated February 14, 1986

APPENDIX E 12
Complaint in the United States District Court for the Western District of Oklahoma (No. CIV-86-2314-A), filed October 17, 1986

APPENDIX F 29
Memorandum from Marge Carmichael, Hearing Office Manager, to all employees, dated January 10, 1987

TABLE OF CONTENTS CONTINUED PAGE

APPENDIX G 30
Motion to Dismiss, or in the Alternative, for Summary Judgment (No. CIV-86-2314-A), filed in the District Court for the Western District of Oklahoma on January 29, 1987

APPENDIX H 32
Order granting defendant's Motion for Protective Order and restricting plaintiff's discovery (No. CIV-86-2314-A), filed in the District Court for the Western District of Oklahoma on February 12, 1987

APPENDIX I 35
Order and Judgment by United States Court of Appeals for the Tenth Circuit denying plaintiff's appeal regarding protective order (Nos. 87-1231 and 87-1278; consolidated under No. 87-1231; D.C. No. 86-2314-A), filed in the United States Court of Appeals for the Tenth Circuit on July 13, 1987

APPENDIX J 38
Order showing District Court has jurisdiction of case and will proceed to a consideration of pending motions — Motion to Dismiss or, in the Alternative, for Summary Judgment; and the defendant's Motion for Costs; Court's protective order of February 12, 1987 reinstated (No. CIV-86-2314-A), filed in the District Court for the Western District of Oklahoma on July 28, 1987

TABLE OF CONTENTS CONTINUED PAGE

APPENDIX K 41
Motion for Protective Order regarding pre-depositional conference by defendant (No. CIV-86-2314-A), filed in the District Court for the Western District of Oklahoma on August 21, 1987

APPENDIX L 45
Order denying plaintiff's Motion for Protective Order (No. CIV-86-2314-A), filed in the District Court for the Western District of Oklahoma on August 25, 1987

APPENDIX M 47
Response to defendant's Motion for Summary Judgment, furnishing excerpts from depositions (No. CIV-86-2314-A), filed in the District Court for the Western District of Oklahoma on October 26, 1987

APPENDIX N 68
Order granting defendant's Motion for Summary Judgment (No. CIV-86-2314-A), filed in the District Court for the Western District of Oklahoma on March 17, 1988

APPENDIX O 73
Order and Judgment of the United States Court of Appeals for the Tenth Circuit denying plaintiff's appeal of summary judgment — affirming judgment of

TABLE OF CONTENTS CONTINUED PAGE

District Court (No. 88-1632; W. D. Oklahoma - D.C. No. CIV-86-2314-A), filed in the office of the Clerk of the United States Court of Appeals for the Tenth Circuit on December 1, 1989

APPENDIX P 76
Article III, §1 and 2; Article V and Article VI of the Constitution of the United States

TABLE OF AUTHORITIES

Cases:

Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833) 28, 29

Bell v. Hood, 327 U.S. 678, 90 L.Ed. 939, 66 S. Ct. 773, 13 A.L.R.2d 383 (1946) 18, 23

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619, 91 S. Ct. 1999 (1971) 17, 19, 21

Bush v. Lucas, 103 S. Ct. 2404, 76 L.Ed.2d 648, 462 U.S. 367 (1983) 21, 22, 25, 26, 30

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) 33

Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 118, 58 S. Ct. 817, 114 A.L.R. 1487 (1938) 33

TABLE OF AUTHORITIES CONTINUED PAGE

Schweiker v. Chilicky, 56 U.S.L.W. 4767, 487 U.S. ____, 108 S. Ct. 2460, 101 L.Ed. 2d 370 (1988) 17, 19, 21, 22, 25, 26, 30

Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842) 33

U. S. v. Gilman, 345 U.S. 507, 98 L.Ed. 898, 74 S. Ct. 695 (1954) 23

U. S. v. Standard Oil Co., 332 U.S. 301, 311, 91 L.Ed. 2067, 2073, 67 S. Ct. 1604 (1947) 23

Constitutional Provisions:

Articles of Confederacy:
Article II 32
Article III 32
Article IV 32

Declaration of Independence 30, 32, 33

United States Constitution:
Article III, §1 and 2 . . . . . i, ii, xv, xvi, 3, 16, 17, 18 22, 25, 26, 27, 29, 30
Article V 29
Article VI 29
Amendment V . . . . . i, 9, 16, 18, 19, 22, 29, 33
Amendment XIV 28, 29

Statutes:

5 United States Code:

§1206 . . . . . 17, 19

TABLE OF AUTHORITIES CONTINUED PAGE

§1206(a) 19, 27
§1206(a)(2) 19
§1206(b) 27
§1206(c) 19, 20
§1206(c)(B) 20
§1206(g) 20
§1206(h) 20
§2301 . . . . . 9, 16, 17, 19
§2301(b) 18
§2301(b)(2) . . . . . i, iii, 15, 16, 19, 20
§2301(b)(4) 19
§2301(b)(7) . . . . . i, 16
§2302(b) 16, 27
§2302(b)(11) . . . . . iii, 16
§2302(c) . . . . . iii, 16, 19
§4101, et seq. . . . . iii, 4, 15, 19
§4103 . . . . . iii, 15, 19
§4301 16
§4302(a)(3) . . . . . iii, 16
§4302(b)(5) . . . . . iii, 15, 16, 19
§4302(b)(6) . . . . . iii, 15, 19
§4303 28
§4303(f) . . . . . i, 7, 15, 18
§7701 . . . . . iii, 20, 26
§7703 . . . . . iii, 26
§7513 28

28 United States Code:

§41 xvi
§1254 xv
§1291 xvi
§1331 xvi
§2101(c) xv

TABLE OF AUTHORITIES CONTINUED PAGE

5 Code of Federal Regulations:

315.905 . . . . . 15, 16
315.908 18
432.203(b) 16

Rules:

Federal Rules of Civil Procedure:

Rule 2 18
Rule 8 18

Rules of the Supreme Court

Rules 17 - 23 xv
Rule 20 xv

Miscellaneous:

Civil Service Reform Act of 1978 . . . . . ii, 15, 17, 21
22, 25, 26

ORDERS FROM
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

1. Order of February 12, 1987, in United States District Court for the Western District of Oklahoma granting defendant's Motion for Protective Order and restricting plaintiff's discovery. [see Appendix H].

2. Order showing District Court has jurisdiction of case and will proceed to a consideration of pending motions - Motion to Dismiss or, in the Alternative, for Summary Judgment; and defendant's Motion for Costs; and Court's Protective Order of February 12, 1987, filed July 28, 1987 in the District Court for the Western District of Oklahoma. [see Appendix J].

3. Order denying plaintiff's Motion for Protective Order, filed August 25, 1987, in the District Court for the Western District of Oklahoma. [see Appendix L].

4. Order filed March 17, 1988, in the District Court for the Western District of Oklahoma granting defendant's Motion for Summary Judgment. [see Appendix N].

ORDERS FROM
COURT OF APPEALS
FOR THE TENTH CIRCUIT

5. Order and Judgment, filed July 13, 1987, denying plaintiff's Appeal regarding Protective Order. [see Appendix I].

6. Order and Judgment filed December 1, 1989, denying plaintiff's Appeal of Summary Judgment; affirming judgment of United States

District Court for the Western District of Oklahoma. [see Appendix O].

OFFICIAL OPINIONS

Order of United States District Court, Western District of Oklahoma, Sustaining Defendant's Motion for Summary Judgment, Dated March 17, 1988 [Appendix N].

Order of United States Circuit Court, Tenth Circuit, Sustaining Defendant's Motion for Summary Judgment, Dated December 1, 1989 [Appendix O].

JURISDICTIONAL STATEMENT

The trial court entered its Final Order March 17, 1988, sustaining Defendant's Motion for Summary Judgment. Plaintiff appealed the ruling to the United States Circuit Court of Appeal for the Tenth Circuit on April 15, 1988. The Court of Appeals for the Tenth Circuit sustaining the District Court's opinion on December 1, 1989. From both decisions, plaintiff's Petition for the Supreme Court to grant Certiorari [S. Ct. Rules 17 through 23] to review the decision filed within the ninety days set forth by S. Ct. Rule 20 and 28 USC §2101(c).

Supreme Court's jurisdiction also rests on Article III, §2, United States Constitution [see Appendix P] and 28 USC §1254.

§2101. Supreme Court; time for appeal on certiorari; docketing; stay

(c) ...any writ of certiorari intended to bring any judgment ordered in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment ordered. The judgment of Circuit Court of Appeals, Tenth Circuit, was entered December 1, 1989.

§1254. Courts of Appeals; certiorari; certified question.

> Cases in the courts of appeals may be reviewed by the Supreme Court by following methods:
>
> (1) by writ of certiorari upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

The jurisdiction of the Circuit Court of Appeals, Tenth Circuit, was based on Article III, §2, United States Constitution [Appendix P], 28 USC §41, and 28 USC §1291.

§1291. Final decisions of district courts.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States....

The jurisdiction of the United States District Court for the Western District of Oklahoma rests on Article III, §2, United States Constitution [Appendix P], and 28 USC §1331.

§1331. Federal question.

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

EVELYN I. LIVENGOOD,
Petitioner,

VERSUS

ROLLIE D. THEDFORD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

CONCISE STATEMENT OF NATURE OF THE CASE

Plaintiff in the District Court, appellant in the Court of Appeals and petitioner in the Supreme Court, will hereafter be referred to as plaintiff; and the defendant as defendant in the lower court.

Plaintiff, a 30-year career government employee as a Hearing Assistant in the Office of Hearings and Appeals, Social Security Administration, was promoted under probation to Supervisor of Hearing Assistants, then demoted upon charges of incompetence, which

plaintiff alleges are arbitrary and capricious, and made in a malicious intent, after only three and one-half months into the promoted position, and made for the purpose of giving her an unsatisfactory appraisal which then was used to demote her to the position she held prior to the promotion and without giving her any notice and chance for hearing to refute such charges and to show they were falsely made and unfounded. Such proceedings were placed in her personnel folder which makes them available to any future government employer and would foreclose her ability to transfer to any other government agency, and thereby imprisons her within the present agency. Such action by the defendant forecloses any property interest she had in the promoted position without any due process hearing to show that such action should not have been taken and destroys her liberty of movement within government.

CONCISE STATEMENT OF FACTS

Plaintiff's case arises under the Constitution of the United States, Amendment Five (5) and Article III, §2, the District Courts shall have original jurisdiction of all civil actions arising under the Constitution, and laws of the United States.

Plaintiff was employed by the Department of Health and Human Services, Office of Hearings and Appeals, as a Hearing Assistant on September 4, 1977, in the Oklahoma City office. On April 28, 1985, a new position was authorized of Supervisor of Hearing Assistants and plaintiff made application therefor and was chosen for promotion by the head of the agency, the defendant, who was the Administrative Law Judge in Charge of the Office of Hearings and Appeals, and based upon her past government service.

Promotion was made during a time of changing the method of operation and preparing cases for hearing by Administrative Law Judges from what was called a "unit" system into a "reconfiguration" system. At the same time this change was taking place, the office was moved from the suburbs of Oklahoma City to the downtown area. The "unit" system comprised a team of an Administrative Law Judge, a Hearing Assistant and a Hearing Clerk working together. The "reconfiguration" system changed this to "pooling" Hearing Assistants into one unit and Hearing Clerks into another unit, and no longer working with one judge. All cases were still prepared for trial just as before the change, but now were prepared for an area, and not a judge such that the Hearing Assistant and Hearing Clerk had no responsibility to any one judge, but were merely responsible for preparing cases, and the judge had no supervisory control over the Hearing Assistants or the Hearing Clerks. Also, directives were received from the Washington office to reassess about 200 cases for mental disabilities, which required them to be reworked, and then directions at least two other times to do

the same thing for different disabilities, making additional 600 cases to work in addition to those being regularly received from local Social Security office. Also, each Hearing Assistant at this changeover had to continue to complete the docket on which they were working for a judge, including plaintiff, and plaintiff was also assigned an additional docket by the defendant. Because of this, she was not able to begin on her supervisory duties until about the middle of July, 1985. All of this — change of system, moving the office, the 600 additional cases to prepare — created much confusion in the office. For this new position of Supervisor of Hearing Assistants, plaintiff was given no instructions or training, though required by statute. 5 U.S.C. §4101, et seq. Plaintiff, in fact, was informed there were no instructions available and that she would just have to "knock her head against the wall" and figure it out for herself. This she did, and prepared a flow sheet of instruction beginning with receiving a case into the office, how it was to be prepared for hearing, including any pre-hearing development for the case, as well as post-development on the case after hearing, doing the same on her own time and after hours. This flow chart was prepared even though the standard method, technique and mechanical way of preparing cases never changed, and each Hearing Assistant had six years prior service as a Hearing Assistant, and the plaintiff having nine years.

At the time, around the middle of July, 1985, or shortly thereafter, complaints were made by the Regional Office of Dallas, regarding the production of cases. Also, about this time, plaintiff was instruction by the Hearing Office Manager (a former Hearing Assistant promoted at the same time as plaintiff) to assign two Hearing Assistants to the post-hearing development on all cases, and two other Hearing Assistants for the scheduling of cases for hearing, and then one left the office, all of which depleted her component from the ten Hearing Assistants, including herself, to five. Then, the head of the agency stated dissatis-

faction that the system; i.e., "reconfiguration", was not working and that he wanted "standardization" and never, at any time, detailed to plaintiff what his dissatisfaction was and what "standardization" he desired. Even so, plaintiff, knowing that the standard method and technique of preparing cases for trial had not changed, thought the "standardization" desired was to standardize the forms of the instruments the Hearing Assistants used and the method or technique in preparing them, even though each judge had the authority to change the method of preparing cases for that judge, or even the forms used. Even so, she made some standardized forms and presented them to the head of the agency, the defendant, for his approval, but each time he would turn down the form which she prepared, but never gave her what he wanted so that she was left without instructions on his desires, but was, as he had said, figuring it out for herself.

The head of the agency, the defendant, then began requiring all Hearing Assistants, instead of working all cases for an area to which they were assigned, to work only for one area which would give one judge a docket of cases for hearing, but left the other judges without anything until, again, all Hearing Assistants could work on another area. Here, again, the

— change of the system,

— change of the location of the office,

— additional cases for mental disabilities,

— taking half of the Hearing Assistants for work of scheduling cases and post-hearing development,

— the demand for increased production,

— standardization without any instruction as to what standardization was desired,

did create confusion in the office among the Hearing Assistants, Hearing Clerks, as well as the Administrative Law Judges. Defendant apparently wanted someone to blame, and blamed the plaintiff. Though there was evident confusion within the management of the office, the defendant, as well as others in the office apparently aiding him in management, created the confusion themselves, hunted for a "fall guy", which became the plaintiff.

CHRONOLOGICAL STATEMENT

On February 21, 1985, and before change of the "unit" system to the "reconfiguration" system, plaintiff was given a fully satisfactory performance rating by the defendant, Rollie D. Thedford, Hearing Office Chief Administrative Law Judge, and under the date of June 6, 1985, was also given a rating stating she demonstrated excellence in her new position as Supervisory Hearing Assistant. [see Appendix A]. This last rating, though interim, had been crossed out by the Hearing Office Manager with the statement to see SSA-1300 dated October 30, 1985. At the bottom of this form, this statement was made: "This employee has received an unsatisfactory or minimally satisfactory summary rating and I certify that I will take appropriate action." This part was not signed nor dated. [see Appendix B]. However, the action taken was a letter of removal dated December 18, 1985, which carried allegations, but not substantiated by any evidence, to the effect that plaintiff was incompetent. Plaintiff was then demoted to her former position by using 5 USC §4303(f), cutting off any right she had to complain or appeal. Therefore, the appraisal reports were made for the purpose of fitting plaintiff into a part of the statute where she could have no rights of recourse. [see Appendix C]. This was followed up by another letter containing allegations by the defendant, dated February 14, 1986. [see Appendix D].

CHRONOLOGY OF EVENTS IN COURT LEADING TO FINAL ORDER OF TENTH CIRCUIT COURT OF APPEALS DATED AND FILED IN OFFICE OF CLERK OF TENTH CIRCUIT ON DECEMBER 1, 1989

Plaintiff attempted to follow the internal grievance procedure and filed a grievance on December 4, 1985, but the same was denied. She appealed to the next higher authority and the regional office in Dallas, which was also denied. From there, she appealed to the Washington office, and also was denied. She did this to show that she had done all she could to get a correction within the office. The grievance took all of 1986 up to the time of filing her complaint in the United States District Court. Thereafter, she filed her complaint in the United States District Court for the Western District of Oklahoma on October 17, 1986. [see Appendix E].

COMPLAINT:

Complaint was filed in the United States District Court, Western District of Oklahoma under No. CIV-86-2314A on October 17, 1986, alleging: [see Appendix E]

1. jurisdiction of the court;
2. how cases arose;
3. no other forum;
4. plaintiff is a 30-year permanent employee of satisfactory service;
5. promoted April 30, 1985, on probation to Supervisor Hearing Assistant (after nine years as a Hearing Assistant) and within 3½ months reduced in grade [5 USC §4303(f)] by an unsatisfactory appraisal arbitrarily and capriciously made by abuse of power of defendant for reason to demote without any chance to defend;

6. plaintiff performed office grievance procedure, but to no avail;

7. rehearing requested stating the issues:

   (a) whether grievant was granted proper and adequate training assistance;

   (b) whether grievant was granted fair, good faith and equitable treatment in position of Supervisor Hearing Assistant before being demoted to Hearing Assistant, which demotion was based upon unsatisfactory appraisal and before grievance thereon was heard;

   (c) whether there was deprivation of grievant's constitutional rights in the demotion process of procedure and property interest;

8. promotion dated April 28, 1985 and probationary;

9. not able to assume duties as Supervisor Hearing Assistant until about the middle of July, 1985;

10. Alleged:

   (a) no improvement plan established,

   (b) no opportunity to improve performance,

   (c) no instructions received from management,

   (d) no guidance procedure available,

   (e) no training course available,

   (f) nor training procedure available,

   (g) no counsel available,

(h) removed thirty (30) days after unsatisfactory appraisal given,

(i) that the 3½ months was inadequate time in the position and there was nothing on which to base the appraisal;

11. position a new one and was not there before;

12. the work flow disruption caused by defendant, and plaintiff was blamed and became the "fall guy" for the inefficiency caused by management;

13. job disruption furnished;

14. sets forth principles of government for employees (corresponds to 5 USC §2301);

15. plaintiff protected by Fifth Amendment to the United States Constitution against deprivation of property and liberty interests, due process procedure and substance;

16. lists procedural due process rights;

17. lists property interests;

17. (misnumbered) substantive due process;

18. waived

19. waived

20. action against grievant were not appealable and not grievable, and regulations place responsibility for training, assisting, instructing upon the management;

21. Prayer for relief in damages.

Because she could not speak with any of the other people in the office who were in a like position as she for fear that similar type action

may be taken against them, she gave notice to take depositions and served all the people in the office, intending later to shorten that list as she was able to get the evidence she thought she would need by depositions. Plaintiff then determined that she would not need all people served, but only some of them and set the depositions down in such a manner that no deponent would have to be away from their office more than an hour to an hour and one-half. Before these depositions could be taken, plaintiff received a letter dated January 10, 1987, from the Hearing Office Manager informing all employees not to honor any subpoenas unless notified by her. [see Appendix F]. Defendant, thereafter, on January 19, 1987, filed a Motion to Dismiss or in the Alternative, for Summary Judgment. [see Appendix G]. On February 5, 1987, defendant asked for a protective order attempting to deny plaintiff any right to take depositions and the court, on February 12, 1987, without hearing, issued its protective order granting plaintiff the right to have depositions of six Administrative Law Judges, but only upon written questions presented and not oral examination. Also allowed oral depositions of eight additional witnesses. Under both, all questions had to be presented to defendant and court before taken. [see Appendix H]. Plaintiff thought that this order was too restrictive to allow her to present sufficient evidence to withstand the Motion for Summary Judgment and attempted to appeal the restrictions to the United States Circuit Court for the Tenth Circuit. Plaintiff was unsuccessful in the attempt. [see Appendix I]. District court then repeated its earlier order regarding the taking of depositions, dated July 24, 1987. [see Appendix J]. Thereafter, the time for taking the depositions were set up by agreement between the parties, and were to be taken August 25, 1987. Plaintiff then learned on August 21, 1987, that the defendant had called for a pre-deposition conference in which all the witnesses that were to testify were asked to be present, other than the Administrative Law Judges, without notifying plaintiff and attempted to have that conference in the office without plaintiff knowing anything

about it. This pre-deposition conference, [Appendix K], and the letter from the Hearing Office Manager, Marge Carmichael, [Appendix F], in plaintiff's opinion, placed such deponents under intimidation regarding their testimony, apparently, just to influence them as to how they were to testify. Plaintiff filed a Motion for Protective Order against such conference, but was denied. [see Appendix L]. So the pre-deposition conference was held without plaintiff or counsel being present. Plaintiff took the depositions as set out in the aforementioned orders and from those depositions was able to prove by testimony under oath that all the allegations against her by the letter of December 18, 1985, and of February 14, 1986, were false and unfounded. The essential elements as taken from the depositions are reproduced in Appendix M. However, plaintiff will further condense here to show that the statements in the letters of December 18, 1985, and February 14, 1986, were really false, and the essential elements thereof are:

The essential elements of the complaints were that plaintiff: (1) lacked leadership; (2) was unable to give clear oral instructions to subordinates; (3) failed to establish workflow; (4) failed to control her organizations; (5) was unable to give day-to-day assignments of work; (6) did not seek counselling from defendant; (7) did not standardize as required by defendant.

The depositions produced the following responses:

a. As to the standard way of preparing cases, such never changed from the "unit concept" before plaintiff's promotion, nor thereafter under the "reconfiguration";

— standardization referred to instruments instead of the mechanical, technical way of preparing cases, never was standardization because judges had authority to change (Carol Eaton)

— method of working cases never changed but judges had authority to change (LaRene Miller)

— standardization up to the judges (Janice Hunnicutt)

— judges sometimes change standard way of preparing a file (Trela Willoughby)

— judges could change any standard way when they so desired (Shelby Lookabaugh)

b. As to the allegations of leadership, and planning, organizing and directing employees, testimony of the Hearing Assistants was that no supervision or leadership was ever needed,each employee had been a Hearing Assistant for at least six (6) years.

c. As to communication, leadership and oral instructions, all indicated there was no trouble in understanding plaintiff's instructions.

d. Plaintiff alleged in her petition that there was certain confusion in the office in the change from the "unit concept" to "reconfiguration", as well as moving the office, and the deponents' answers to that are:

— there was confusion from the change from unit to reconfiguration, screening of the mental impairment cases, and the move of the office (Eaton)

— very chaotic time in move (Sandra Babb)

— lot of confusion in making things work with the move and change of system, and indicate confusion because Hearing Assistants not working together, but could not say it was plaintiff's fault (Lookabaugh)

— turmoil mentioned from the physical move from one building to another and reorganization, with finishing up prior work and getting into the new work, confusion accelerated and mental impairment cases

disrupted workflow, such turmoil continued into 1986 and plaintiff might not have ample time to prove herself because of the confusion (Willoughby)

e. There was also indicated by the depositions that a clique of certain people existed in the office and that such may have affected plaintiff's performance and could be one cause for her removal (Eaton), then named those in that clique.

f. As to the workflow, although testimony showed the standard technical, mechanical way of preparing cases never changed, nevertheless, plaintiff prepared such a workflow chart for each Hearing Assistant.

g. As to the counselling from defendant, plaintiff states in her Response the only thing she ever received was "she had to solve her own problems, even if she had to beat her head against the wall", and told plaintiff not to seek counsel of defendant.

h. The interrogatories of the Administrative Law Judges also revealed that plaintiff was not given a fair chance in the position to prove herself,

— that management determination confusing to anyone, no training given to her, pulled the rug out from under her, plaintiff tried to do a good job, suddenly first clear operation of the office, then general efficiency by change dropped to rock bottom, seemed office run by Supervisor Staff Attorney and Hearing Office Manager, after she was pulled out of the office, there was no improvement, continued to be as before, if not worse (Judge O'Bryan)

— in the position only about 4 months, utter chaos involved in office, no fair chance given because takes too long to initiate reconfiguration, has not worked yet, plaintiff had to initiate a program that had not been tested, and general efficiency has decreased

since removal and inefficiency was not her fault (Judge Marrs)

— three months not sufficient to fully evaluate her, no one talked to her as to what the function of a supervisor's office was, failed to see how personnel function with respect to preparing cases was the fault of plaintiff, Hearing Assistants had done what they had done prior to reconfiguration, lack of efficiency due to reconfiguration rather than plaintiff (Judge Gossett)

— as to her ability in efficiency she is rated excellent, regarding the efficiency of the office, after plaintiff's removal, functioning of the Hearing Assistants continued decline, loss of her support and help still felt by judges in solving their problems with management, plaintiff was in no way at fault for the office management and its inefficiency and someone else in management was responsible and accountable for the deteriorating system (Judge Darks)

— plaintiff rated excellent as to her ability, also indicated that plaintiff visited with Judge Wampler and indicated her willingness to voluntarily step down, that he contacted the defendant, Judge Thedford, and was told to tell the Hearing Office Manager, Marge Carmichael, not to do anything until he returned from his docket (Judge Wampler)

— thereafter is mentioned by Judge Marrs that Marge Carmichael disregarded what she was told and sent the unsatisfactory appraisal report to the Regional Office (Marrs).

Thereafter, hearing was had on defendant's Motion to Dismiss and was overruled and the Motion for Summary Judgment was continued. Thereafter, on March 17, 1988, the court issued its order sustaining Motion for Summary Judgment. [see Appendix N]. Plaintiff appealed

this order sustaining summary judgment to the United States Circuit Court for the Tenth Circuit. That court, on December 1, 1989, issued its order. [see Appendix O].

ARGUMENT

VIOLATION OF STATUTE LEADING TO VIOLATION OF CONSTITUTIONAL RIGHTS

The Civil Service Reform Act of 1978 (hereafter referred to as CSRA 1978) became effective January 11, 1979. Defendant used 5 U.S.C. §4303(f) to reduce plaintiff in grade to her former position, after preparing an unsatisfactory appraisal report in order to place her in a position where she had no hearing rights or appeal rights, and put her in a position where she had to accept whatever arbitrary action he desired to take, which was a malicious intent to deprive her of any property right she had, of any liberty interest she had, or any life she had in government service after 30 years of satisfactory employment. Such action was taken without any instruction or planned training as required by the statute the agency head being responsible to set up such training (5 USC §4101, et seq.); and without using the appraisal report to assist her in meeting unsatisfactory performance, 5 USC §4302(b)(5); and reducing her in grade before she had ample opportunity to demonstrate acceptable performance [5 USC §4302(b)(6)], even though the head of the agency must set a reasonably fixed duration appropriate to the position for a person to show acceptable performance [5 CFR 315.905]. All the above violations were in the face of Merit System Principles [5 USC §2301(b)(2)], requiring "in all federal personnel management...all employees shall receive fair and equitable treatment...with proper regard for their constitutional rights". Therefore, because the defendant took personnel action without performing under his responsibility to do so, 5 USC §4101 and §4103, et seq., with responsibility for training placed in the head of the agency to establish

and operate a program of training of all employees relating to the performance of such employees for their official duties in order to increase the knowledge, proficiency, ability, skill and qualifications, for the benefit of the employee as well as the government service, defendant violated 5 USC §4302(a)(3) which required any appraisal report to be used as a basis for training, and to assist employees in improving unacceptable performance, §4302(b)(5), and then reduced in grade before such assistance and such training, §4302(b)(6), and 5 CFR 315.905 and 432.203(b). All of such violations were unfair and inequitable and were taken without proper regard for her constitutional rights, §2301(b)(2), thus placing her claim under the Fifth Amendment to the United States Constitution that no person may be deprived of life, liberty or property without due process of law, and places her claim under an Article III court for the deprivation of such right, and plaintiff at no time waived her right under the Fifth Amendment right.

All of such violations come under §2302(c) making the head of the agency responsible to prevent prohibited personnel practices and would be a personnel action that "shall not be taken, §2302(b), if the taking, §2302(b)(11), of that action violates any law, rule or regulation implementing or directly concerning Merit System Principles, (5 USC §2301). Because such taking does, in fact, concern the Merit System Principles because the statute promulgated by Congress, §4301, et seq. (training), §4302(b)(5) (assist employees to improve acceptable performance, and not reduce in grade until employee has opportunity to demonstrate acceptable performance), §2301(b)(7) (education and training), naming the person to be benefitted by the statute, the employee, and the statute not carried out by the one responsible to do so, the head of the agency violates §2301(b)(2) of unfair and inequitable treatment without regard for the employee's constitutional rights. Even though such be classed as prohibited personnel practices subject to §2302(b) which would place any complaint therefor under 5 USC

§1206 of the Office of Special Counsel, we have the violation not only of the statute, CSRA 1978, but also a violation of an employee's constitutional rights of §2301, which the employee has a right to redress under an Article III court, the only tribunal authorized to try a constitutional violation, if demanded and not waived.

INAPPLICABILITY OF SCHWEIKER V. CHILICKY, 56 U.S.L.W. 4767, 108 S. Ct. 2460, 101 L.Ed. 2d 370 (1988)

The case involved a statute, stated in the case, for disability subsistence and applied to any person who would fit themselves into the statute in order to receive disability payments. Chilicky did that. The statute provided that the Commissioner of Social Security Administration could stop the benefits at any time and the recipient would have to prove entitlement. The commissioner stopped the payments to Chilicky while he was in the hospital suffering from a heart attack. The case does not indicate Chilicky did not receive notice of the denial of benefits. Congress had passed a statute that benefits could not be stopped until the recipient had opportunity to show, even before Administrative Law Judge, entitlement but the statute was not effective at the time action taken. Chilicky did nothing for two years. In the meantime, others whose benefits were stopped had proceeded through administrative process to retain benefits, and succeeded in retention. After two years, Chilicky did not pursue administrative remedy, but made a new application for benefits for the year and a half of lost benefits. He received the one year benefit, and the six month back benefit application was pending at the time he filed a case under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619, 91 S. Ct. 1999 (1971). Chilicky had one claim or one cause of action for any damages of benefits to which he would be entitled. He chose the method of recovery by filing a new application and, from that choice, received

recovery. He attempted to divide his claim of recovery into two separate methods. One being a new application through the administrative process, and the other through the district court. According to Rule 2, F. R. Civ. P., there shall be but one form of action to be known as a civil action. In Rule 8, F. R. Civ. P., the type of pleadings are listed stating what the pleading shall contain, and it says that "relief in the alternative or several different types may be pleaded." If there was a violation of Chilicky's constitutional rights as the court of appeals held (108 S. Ct. at 2469, 56 USLW at 4769), then his cause of action would have been in the District Court unless waived. Yet he chose not to pursue his District Court action, but to stay with the statutory method of receiving benefits. [See Bell v. Hood, 327 U.S. 678, 681, 66 S.Ct. 733, 775, (1940)]. He was, therefore, limited to that statute because by choosing that method, he forfeited his cause, if any there was, under the constitution because there was only one set of circumstances and facts that made up his claim and he was attempting to divide those circumstances and facts into two separate claims before two separate tribunals, one an Article III court and the other administrative proceeding under the statute. That case does not apply to the present case because the plaintiff, Livengood, has no administrative appeal, 5 CFR 315.908, 5 USC §4303(f). Since by the fraudulent allegations against her resulting in an unsatisfactory appraisal for the purpose of coming under §4303(f) any right of appeal administratively is cut off. Yet, because such an action would fall under the category of unfair and inequitable treatment of 5 USC §2301(b), which action did not have proper regard for her constitutional rights and since the action was taken, it violated her rights under the Fifth Amendment of the United States Constitution. Therefore, her cause is a constitutional claim triable in an Article III court only, because there is nothing in the Constitution which authorizes Congress at any time to deny a citizen of the United States, who is one of the "we the people" who ordained the constitution, access to an Article III court for redress and recovery

of a violation of a constitutional right, even though the "citizen" is a government employee. Livengood case is wholly distinguishable from Chilicky or Bush. To allow a constitutional claim to a "citizen" who is a non-government employee, as in Bivens, and not allowing the same to a "citizen" who is a government employee, as in Bush, is an unconstitutional distinction as unfair and inequitable, contrary to due process of the Fifth Amendment of the United States Constitution.

VIOLATION OF STATUTE LEADING TO PROHIBITED PERSONNEL PRACTICE

Since there was a violation of 5 USC §4101 and 4103, et seq. (training), a failure to use any appraisal report to assist plaintiff in meeting unacceptable performance, §4302(b)(5), reducing in grade before she had an opportunity to prove acceptable performance, §4302(b)(6), as well as a chance to show she had met §2301(b)(4), defendant, Thedford, denied plaintiff fair and equitable treatment, and did not have proper regard for constitutional rights, 5 USC §2301(b)(2), and that such violation amounted to prohibited personnel practices by taking action that violates any law, rule or regulation implementing or concerning Merit System Principles, 5 USC §2301, with the head of the agency having the responsibility to prevent such practices, 5 USC §2302(c), all of which could place plaintiff under 5 USC §1206, Office of Special Counsel, such procedure may possibly give her a correction only. The Office of Special Counsel's duties are discretionary and the only thing that he is required to do is "he shall receive" a complaint and make investigation, 5 USC §1206(a), and if he determines no grounds for prohibited personnel practice, notifies the claimant, §1206(a)(2), and then the claimant has no other place to go. Under §1206(c), after investigation, if the Office of Special Counsel determines reasonable grounds to believe a prohibited personnel practice has occurred for which a corrective action would be required (but note only he determines if corrective action is required and no court could require a person

under such discretion to do anything when he has a discretion not to do it), report is made to the Merit System Protection Board, the agency involved and Office of Personnel Management. Such report may include a recommendation for correcting action. Then under §1206(c)(B), if the agency takes no corrective action reported, not even that recommended, the Special Counsel may request the Board to consider, then the board may order a corrective action, but only after opportunity for comment by the agency or Office of Personnel Management. In neither procedure does the claimant have any opportunity to appear or to have any kind of hearing setting forth a claim and claimant is limited by what is reported to Office of Special Counsel. Then under §1206(h), if the Special Counsel determines there has been a pattern of prohibited personnel practices, not otherwise appealable to Merit Systems Protection Board under 5 USC §7701, the Special Counsel may seek the corrective action by filing a written complaint with Merit Systems Protection Board against the agency. Again, the complainant has no right to appear or to state his claim. The Special Counsel could file a written complaint against the employee, but in so doing he would no doubt ask for a disciplinary action under §1206(g), then the employee has an opportunity to answer. Such written complaint may be for disciplinary action or for a criminal violation under §1206(c).

You will note that unless some written complaint is against the employee, the employee has no rights whatsoever. When the Special Counsel files a written complaint for either disciplinary or criminal action there is a penalty against the employee, but the one who has taken the action, the agency head, has used the power granted him free of any accountability as a practical matter under statute. Such procedures for any kind of correction by the employee as against the penalties that may be taken against the employee are so unfair and inequitable under §2301(b)(2) that it would have to be classed as being without any regard for an employee's constitutional rights and thereby throw that person

right into the constitution for any redress or recovery. Consequently, Chilicky cannot, in any way, have any applicability to the plaintiff's claim.

INAPPLICABILITY OF BUSH V. LUCAS 103 S. Ct. 2404, 76 L.Ed.2d 648, 462 U.S. 367 (1983)

Bush was a government employee who made certain public statements against the head of his agency until he was removed from his position. He started his administrative claim in about 1975. He had to have known about the Bivens decision in 1971. However, Bush chose the administrative remedy or redress through grievance procedures in the agency, all of which were denied, then he appealed to Civil Service Appeals Authority, where his claim was also denied. After two years, he applied to the Civil Service Review Board for redress and recovery and while that was pending he filed his action under Bivens case. The Civil Service Review Board reviewed his claim in relation to the violation of his constitutional right of freedom of speech, because he presented it for consideration submitting to Civil Service Review Board, who said that although some portions were untrue, yet some of them were true and that he did have a right to his freedom of speech, and they gave him a recovery by reinstating him in the position from which he was removed, and gave him his back pay of $30,000.00, so that in respect to his position he lost nothing, disregarding any personal expense he might have had. Again, here, Bush had one claim and he could plead it in the alternative, but rather than choose to go to the District Court under a Bivens type action into which would merge any damage he sustained under the statute applicable at the time, which was the Civil Service regulations prior to CSRA 1978, yet he chose his course of action and the method of getting redress or recovery and divided his one claim into two different claims into two different tribunals, one the District Court and the other the Civil Service process.

By choosing Civil Service, he forfeited any claim he had for constitutional rights in the District Court because he voluntarily submitted that claim of violation of constitutional rights of freedom of speech to the Civil Service Appeals Authority as well as the Civil Service Review Board. He received a redress and a recovery under the avenue of redress which he chose. Under the Federal Rules of Civil Procedure, he did not have the authority to divide his claim. Just as quoted above under Chilicky, the plaintiff, Livengood, has only one choice, and that is to pursue the Bivens type claim in the District Court of the United States for the violation of her Fifth Amendment constitutional rights before an Article III court as one of the "citizens" who ordained the court for the purpose of protection against the violations of constitutional rights, by either of the other branches of government, legislative or executive, Congress having no right to deny such right nor the court having any authority to deny access to an Article III court.

SPECIAL FACTORS AND ALTERNATIVE REMEDY

Both Chilicky and Bush used the CSRA 1978 as both a "special factor counselling hesitation" and an "alternative remedy equally effective in the eyes of Congress", which was first brought out in Bivens, and it seems each circuit court of appeals has used these expressions in the same manner, which plaintiff wishes to show is a misapplication of those statements as made in Bivens. In Bivens at 403 U.S. at 392, 29 L.Ed.2d at 624, it made the statement that

> "where federally protected rights [i.e., constitutional] have been invaded,...the courts would be alert to adjust remedy to grant the necessary relief",

and at 403 U.S. at 396, 29 L.Ed.2d at 626, stated:

> "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

It quoted Bell v. Hood, 327 U.S. at 684, 90 L.Ed. at 944, then it made the statement:

> "the present case involves no special factors counselling hesitation in the absence of affirmative action by Congress. We are not dealing with a question of 'federal fiscal policy' as in U. S. v. Standard Oil Co., 332 U.S. 301, 311, 91 L.Ed. 2067, 2073, 67 S. Ct. 1604 (1947),"

a case where government was the plaintiff and attempted recovery against Standard Oil who had injured a soldier through negligence — thus the cause of action belonged to the soldier, unless assigned to government. There was no constitutional claim. It supported this by United States v. Gilman, 347 U.S. 507, 98 L.Ed. 898, 74 S. Ct. 695 (1954). A case, again, where the United States was the plaintiff in a suit against an employee who had caused injury to a private company and government had to make good the injury under the Federal Tort Claims Act. The case was based upon negligent injury and the constitution was not involved. The court was using these circumstances where the United States government was the plaintiff on a negligent claim as the "special factors" where the court would not allow that type of action. There is no indication therein that the expression "special factors counselling hesitation in the absence of Congressional action" was intended to extend to an employee of government who had been injured by the action of some agency head or supervisor with his claim being directly under the Constitution, nor did it appear to extend such "special factors" to an employee of government injured by an agency head or supervisor for claim under a statute, both being negligent actions and no constitutional claim involved. It then made the statement:

> "For we have no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must, instead, be remitted to another remedy, equally effective in the view of Congress." 403 U.S. at 397, 29 L.Ed.2d at 627.

It was not saying that Congress could pass any legislation that would deprive an individual "citizen" of an action under the Constitution, but that there was nothing to force this person to seek another remedy which Congress may have tried to allow, without even saying how the court would receive any Congressional action which attempted to deprive a United States "citizen" of his claim directly under the Constitution for the deprivation of his right thereunder, or attempted to deny the court's power to hear a claim directly under the Constitution.

Justice Harlan, in his concurring opinion, makes the true constitutional observation when he said:

> "I am of the opinion that federal courts do have the power to award damages for violation of 'constitutionally protected interests' and...the traditional judicial remedy such as damages is appropriate..." 403 U. S. at 399.

and then:

> "I turn first to the contention that the constitutional power of federal courts to afford Bivens damages for his claim depends on the passage of a statute creating a 'federal cause of action.' " 403 U.S. at 399.

> "Therefore, the question [403 U.S. at 401] is of judicial power to grant Bivens damages is not a problem of the 'source' of the 'right'; instead, the question is whether the power to authorize damages as a judicial [403 U.S. at 402] remedy for the vindication of a federal constitutional right is placed with the constitution itself, exclusive in Congress's hands."

> "The contention that the federal courts are powerless to accord a litigant damages for his claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notation that the decision to grant compensatory relief involves a resolution of policy consideration, not susceptible to judicial discernment." 403 U.S. at 402.

Therefore, any use of the CSRA 1978 as a "special factor" to deny a "citizen", even a government employee, a right of action in an Article III court for the deprivation of a constitutional right is a misapplication because Congress has no authority under the constitution to pass any legislation that would deprive any United States "citizen" of a constitutional claim or the right to pursue that constitutional claim for the deprivation thereof in a constitutional Article III court. At the same time, there is no authorization in the Constitution for Congress to pass any kind of an alternative remedy which could be classed as "equally effective in the eyes of Congress" as a substitute for a constitution claim or the right to pursue such claim in an constitutional Article III court. [see Questions 6 and 7]. Therefore, those expressions have been misused and misapplied in both Chilicky and Bush if they are being applied to deny a "citizen" the right to pursue that constitutional claim in a constitutional Article III court and are attempting to force that "citizen" to pursue such claim before an administrative person or administrative body, neither of whom would have the authority under the constitution to hear and decide a constitutional claim. [see Question 8].

UNCONSTITUTIONALITY OF CSRA 1978 AND UNCONSTITUTIONAL APPLICATION OF CSRA 1978

Although at this point in this application for certiorari plaintiff is not entitled to present the unconstitutionality of CSRA 1978 or its unconstitutional application to her case because plaintiff would be asking the court to take original jurisdiction of a matter in which it has

only appellate jurisdiction, yet it should be brought up here to show the Court why the District Court's order sustaining defendant's motion for summary judgment and the sustension thereof by the Court of Appeals for the Tenth Circuit on the basis of Chilicky and Bush, should be reversed and Court should grant certiorari in order to hear the whole matter, and to allow the plaintiff an opportunity in the lower court to show the unconstitutionality of CSRA 1978 as well as its unconstitutional application to plaintiff. CSRA 1978 and its applicability to plaintiff as detailed above is or can be considered as unconstitutional in that:

1. It attempts to force plaintiff through prohibited personnel practice to try a constitutional claim before an administrative person, Special Counsel, or before an administrative agency should a complaint be filed against the employee before Merit Systems Protection Board when, by the statute itself, such prohibited personnel practice cannot be sustained before Merit Systems Protection Board under 5 USC §7701, and if not sustainable there, it certainly cannot be sustained upon appeal to the Circuit Court for the Federal Circuit under §7703. [see Questions 6, 7 and 8].

2. If a prohibited personnel practice by the statute would somehow get before Merit Systems Protection Board and be sustained, then to appeal to the Circuit Court for the Federal Circuit would be asking an appellate court to take original jurisdiction in a matter in which it has only appellate jurisdiction by Article III of United States Constitution, and which is triable only before a United States District Court because the Circuit Court for the Federal Circuit is an extension or adjunct of the United States Supreme Court in respect to appellate jurisdiction. [see Question 10].

3. The statute, CSRA 1978, attempts to prohibit a "citizen" of the United States the right to proceed on a violation

of a constitutional right before an Article III court and to try a violation of constitutional right before an administrative person, Office of Special Counsel, or an administrative board, Merit Systems Protection Board, when that "citizen", even though a government employee, is one of the "we the people" who ordained the Article III courts for the "citizen's" protection against the power of other branches of government. [see Question 8].

4. If a violation of the Constitution exists in fact in respect to plaintiff, the United States Supreme Court would be acting contrary to its jurisdiction under Article III and would be denying a "citizen", though a government employee, access to an Article III court for redress and recovery for a deprivation of a constitutional right by attempting to force plaintiff to pursue such violation before an administrative person or agency when such administrative person or agency has no constitutional authority to hear and decide a deprivation of a constitutional right. [see Questions 6, 7 and 8].

5. There is great unfairness and inequity between the agency head and the one therein taking action which is penal in nature, exerted by power of the agency tantamount to judicial power without accountability for such action, except the employee may try for grievance which is before the person in the agency who took the action and who is not likely to reverse, then appeal to the person in the same relative position next higher in rank who stands in the same position and also is not likely to reverse, and then to the next higher with the same result — when the employee has only a possibility of correction only, and that before the Office of Special Counsel, whose jurisdiction is limited to prohibited personnel practices, 5 USC §1206(a) and disclosure of information, 5 USC §1206(b), and discrimination, 5 USC §2302(b), with the employee having no right to appear before the Office of Special Counsel or the Board, but is limited to that which is placed in the

complaint to the Office of Special Counsel. The only right the employee has for notice, hearing and appeal is under 5 USC §4303 action or unsatisfactory appraisal (unless employee is on probation), and 5 USC §7513, for such cause as will promote efficiency of the service.

6. Any action taken against an employee forces the employee, if the employee deems the action unjust, unfair or inequitable, to protracted litigation that may extend over years, when, if the employee were granted an impartial hearing before any action is taken to show by evidence the action would be against the statute, or unconstitutional, or even if the action is well founded, the substance of the person's life, liberty or property affected is so sacred and constitutionally protected that it is to be guarded against any injustice, unfairness and inequity, that there should be due consideration of the detriment to the employee as compared with the burden on the agency that some other way should be found, if possible, to make correction.

PRIOR COURT DECISIONS WHERE CONSTITUTION NOT FOLLOWED OR COURT REVERSED ITSELF

In an 1833 case, Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833), the court made a very serious and mistaken application of the Constitution which, thereafter, was religiously followed as judicial precedent and the principle stated therein is still with us today. After the civil war there was an attempt by the passage of the Fourteenth Amendment to overturn it, but the principle was followed for a long time until lately in the last 30 to 40 years, inroads were made, but the judicial precedent, in some respects, remains today. The case arose out of the City of Baltimore grading streets over a period of years to allow silt to drain into a harbor where the plaintiff had a wharf which could take ships of deep draft, but because of the silt, it was able to take only shallow draft ships. The plaintiff sued for damages in a lower court and received damages. The City of Baltimore appealed to the Supreme

Court of Maryland where it was reversed, but with no direction as to what to do with the case. Plaintiff appealed to the Supreme Court and, for the first time, raising the question in the Fifth Amendment of the Constitution that "property cannot be taken without just compensation". Raising this question in the Supreme Court was asking the Supreme Court to take original jurisdiction over a constitutional claim for which it had only appellate jurisdiction, [United States Constitution, Article III, §2]. Instead of stating that the court did not have original jurisdiction of the claim and sending it back to the lower court to try that claim, the court stated, after some dissertation, that "these amendments contain no expression indicating an intention to apply them to the State governments", [32 U.S. 243, 250]. The case was before a state court. Thereafter, this became a judicial precedent and the Fourteenth Amendment was passed for the purpose of overturning it. No one read or heeded Article V, [see Appendix P], which provides that "every amendment to the constitution made according to Article V for all intents and purposes is a part of the constitution", nor did they read and heed Article VI, [see Appendix P], which provides that "the Constitution of the United States is the supreme law of the land and the judges of every state are bound thereby, anything in the state's constitution or laws to the contrary notwithstanding". Had the Supreme Court sent Barron back to the lower court, Barron could have pled the benefit of the Fifth Amendment to the Constitution that he could not be "deprived of his property without just compensation", even though it be in a state court because the state judge would have been bound by the Fifth Amendment and would had to have honored it. If not honored, the case could have been appealed, and the appeal would have gone to the Supreme Court through the appellate procedure and jurisdiction, and not original. The only way any government can enforce its laws is through its court system, whether by the national government or the state government. Because no one heeded Article V or VI, that judicial precedent remains with us today and is still quoted. Plaintiff believes

that the court is about to make another very serious error which has already been made if Bush and Chilicky are intended to deprive a "citizen" of any constitutional claim he may have, even though a government employee, and to deprive that "citizen" of his constitutional right to pursue his claim in an Article III court. [see Questions 1 and 2]. If so, there would be a judicial precedent affecting thousands of "citizens" just because they become government employees and will deny their constitutional right and access to the Article III courts for redress.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT — FROM WHERE DID IT COME?

At the time of the making and of the signing of the Declaration of Independence on July 4, 1776, 56 men of importance, stature and wealth pledged their fortunes, honor and lives to secure independence from the government under which they were serving. Many of them actually lost their lives, as well as their families, with their homes destroyed or burned. In that Declaration, it was stated:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights, governments are instated among men deriving their just powers from the consent of the governed."

Then in the last paragraph, it was stated:

> "We, the representatives of the united States of America,... appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these colonies, solemnly publish and declare, That these united colonies are, and of right ought to be, free and independent states;...and for the support of this declaration, with a firm reliance

on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor."

Under the above statement of "rectitude of our intentions," the word "rectitude" meant the same thing then as it does today in any dictionary, and it means: the morality of their intentions, the righteousness of their intentions, the correctness of all judgments and procedures, and integrity and honesty in carrying out their intentions. Therefore, the government they were willing to die for would be a government of just powers and be administered under morality, righteousness, correctness of judgments or procedures with integrity and honesty. Such principles are the only unchangeable foundation and standard by which all law should be made and administered. When such unchangeable foundation and standard is lacking, any law will be changed according as men change. We will then be a government of men and not of law. When it said in the preamble to the constitution "to establish justice", this was the same "justice" which the Declaration declarants wished and desired to have in their government by their consent, and when it said "to secure the blessings of liberty", this was the same "liberty" they expected their "just" government to exercise to protect their life, liberty and pursuit of happiness. When we put these expressions together: just, justice, liberty, along with morality, righteousness, correctness of judgments or procedures with integrity and honesty, it adds up to one thing, and that is "fairness and equity" in all transactions, whether by government or individuals. When it stated in Amendment V that "no person shall be...deprived of life, liberty or property, without due process of law," it adds up to the "fairness and equity" because by due process, a person has an opportunity to be heard and his case put before any tribunal before which he stands to either prosecute or defend, so that "fairness and justice" may be established.

One grave error that was made in the Articles of Confederation and the Constitution, was that both were limited to "free persons" without

regard to the statement in the Declaration that "all men are created equal and are endowed by their Creator with certain unalienable rights, among which are life, liberty and the pursuit of happiness". These 56 people who signed the Declaration were supported by thousands and thousands who fought with them and, likewise, lost everything, and the thousands who supported them also lost. Because this was done on behalf of and upon the "authority of the good people of these colonies", then all the good people of the colonies were in the position of being beneficiaries of all that was done, and since done for their benefit, they could claim the benefits of that declaration and the securing of freedom under that declaration. About a year and a half later, November 15, 1777, thirteen of those original signers, along with the about 37 others, met to form a government which they called Articles of Confederation. In Article II, "each state retained its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation, expressly delegated to the United States"; and in Article III the states entered into a "league of friendship with each other for the security of their liberties". However, it was limited to free inhabitants, Article IV, and the people of the different states were entitled to the privileges and immunities of free citizens in the several states. The Articles went into effect March 1, 1781. It did not last, and could not last, because it was a confederacy of friendship only. Therefore, they came together again on February 21, 1787, to amend, but instead they rewrote the entire constitution, and the representatives, instead of being representatives of independent states now became representatives of a nation to be called the United States of America, and in the preamble it said:

> "We the people of the United States in order to...establish justice...secure the blessings of liberty to ourselves and our posterity, due ordain and establish this constitution for the United States of America."

NOTE! THE SOVEREIGNTY OF STATES WAS LEFT OUT AND THERE WAS NO SOVEREIGNTY OF STATES AS COULD BE AGAINST THE CONSTITUTION THAT "WE THE PEOPLE" ORDAINED — BUT AS A "TRADITIONAL" LAW, THOSE IN POWER COULD NOT DIVORCE THEMSELVES FROM THE ATTITUDE OF SOVEREIGNTY.

The only power any government was to have by virtue of the Declaration was one who would receive its just powers from those who consented for the purpose of protecting their "life, liberty and pursuit of happiness".

Because the people who formed the Articles of Confederation and the Constitution did not heed that "all men are created equal", it brought about the Dred Scott decision, in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), declaring slaves were property and could be moved about even in areas where slavery was prohibited without losing the right to their property, that is the slaves. Within five years, that, along with other differences between the North and South, brought on a war, all because the court did not follow the principles stated in the Declaration, which were brought into the Constitution of the United States by the expressions of "to establish justice, to ensure the blessings of liberty," and the due process clause of the Fifth Amendment which decrees fairness in all discourse and all laws.

AN EXAMPLE OF THE COURT REVERSING ITSELF AFTER NEARLY 100 YEARS OF PRECEDENT

In Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842), the court had stated that the federal courts would determine causes of action before it according to its jurisdiction and its determination and would follow state law only when a state statute was involved. Yet, in 1935 in Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 118, 58 S. Ct. 817, 114

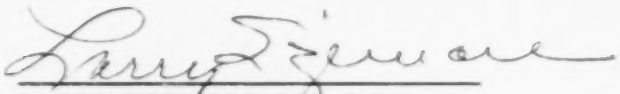
A.L.R. 1487 (1938), the court reversed itself stating that it would follow the law of the state where the cause of action arose in common law, contract law or statutory law. So, when the court determines a prior error has been made, it does not hesitate to reverse itself.

Law cannot be made by inadvertence and nothing in the Constitution authorizes Congress to make law by such method. Law (legislation) is made by both houses of Congress with approval by the President's signature and made in pursuance to the Constitution, which must be a <u>just</u> law to protect the "life, liberty and pursuit of happiness" of those who granted the <u>just</u> powers through the Constitution and administered for such purpose through morality, righteousness, correctness of judgments and procedures, with integrity and honesty, all of which are the unchangeable standards and foundations by which all law must be measured, all based on accountability of all actions of men and government. Any other method of making law or ministering the same makes any government a government of men and not of law.

PRAYER FOR RELIEF

Plaintiff prays that the Court will grant Certiorari, reverse the summary judgment holding of the United States Court for the Tenth Circuit, the United States Court for the Western District of Oklahoma, because there are too many unanswered questions of fact to sustain it, and direct that plaintiff is entitled to a full hearing in the District Court to determine all questions raised herein relative to the deprivation of her constitutional claim and right to pursue such claim in the District Court for all relief to which she may be entitled.

RESPECTFULLY SUBMITTED,



LARRY SIZEMORE, INC., P.C.
By Larry Sizemore, Attorney
OBA #8283
1400 S.W. 89th Street
Oklahoma City, OK 73159
(405) 691-3353

APPENDIX

APPENDIX A

SSA EMPLOYEE PERFORMANCE MANAGEMENT SYSTEM
PERFORMANCE PLANNING AND REVIEW

(See Reverse for Instructions)

Employee's Name (Last - First - MI)			
LIVENGOOD, Evelyn I.			
Social Security Number: 441-28-1698	Organization (e.g., Office, Division, Branch, Section or Region, Office, Etc.): HHS/SSA/Office of Hearings & Appeals, Region VI, Oklahoma City, Okla		
Position Title: Hearing Assistant		Series: GS-986	Grade: GS-08
Position Number: 99437	Performance Period From: Mo. 10 Day 01 Yr. 84	To: Mo. ___ Day ___ Yr. ___	

THE PERFORMANCE PLAN FOR THIS APPRAISAL PERIOD CONSISTS OF 5 GENERIC JOB TASKS

CERTIFICATION OF COMMUNICATION OF PERFORMANCE PLAN (FORM SSA 87) *(COPY ATTACHED)*

Supervisor's Signature	Reviewer's Signature (as needed)	Employee's Signature
Date: 10/01/84	Date:	Date: 10/1/84

Progress Review Comments

. Livengood is thorough and accurate in pulling exhibits and in examining claims files. .ne is quick to recognize technical legal problems. She conducts legal research and recommends the use of Vocational Experts and/or the need for Consultative Examinations to the ALJ.

Ms. Livengood is performing satisfactorily to excellent in all GJTs of her position.

☐ CONTINUATION SHEET

Supervisor's Signature	Date	Employee's Signature	Date
Dollie B. Bedford	2-21-85	Evelyn I. Livengood	2/21/85

Progress Review Comments

Mrs. Livengood is demonstrating excellence in her new position as Supervisory Hearing Assistant. She is working toward a well organized Hearing Assistant component.

All SSA-1300 dated 10/30/95

☐ CONTINUATION SHEET

Supervisor's Signature	Date	Employee's Signature	Date
Dollie B. Bedford	6-19-90	Evelyn I. Livengood	6/19/90

Form SSA-1301 (6-84) (SSA Exception to HHS 669 A, B, C)

[APPENDIX]

APPENDIX B

SSA EMPLOYEE PERFORMANCE MANAGEMENT SYSTEM
PERFORMANCE APPRAISAL
(See Reverse for Instructions)

REASON FOR APPRAISAL
X Regularly Scheduled
Special
Reassignment (Date) __/__/__
Postponed From (Date) __/__/__
Start of Extended Absence

Employee's Name (Last, First, MI)
LIVENGOOD, Evelyn I.

Social Security Number: 441-28-1698

Organization (e.g. Office, Division, Branch, Section or Region, Office, Etc.)
DHHS/SSA/Office of Hearings & Appeals, Oklahoma City, Oklahoma

Position Title: Supervisory Hearing Assistant

Series: GS-986

Grade: GS-9

Position Number: 99D83

Performance Period: From Mo 0 6 Day 2 8 Yr 8 5 To Mo 1 0 Day 3 0 Yr 8 5

THE PERFORMANCE PLAN FOR THIS APPRAISAL PERIOD CONSISTS OF 7 GENERIC JOB TASKS

APPRAISAL BY ELEMENT

Job Element Number	C = Critical, NC = Non-Critical	Number of Performance Deficiencies: Appraising Official	Number of Performance Deficiencies: Reviewing Official
32	C	0	
33	C	0	
187	C	1	
42	NC	1	
78	NC	2	
7	C	0	
192	NC	1	

SUMMARY APPRAISAL

Unsatisfactory — This summary appraisal applies if the employee failed to meet one or more critical job elements regardless of performance on non-critical job elements. [X] U

Minimally Satisfactory — This summary appraisal applies if the employee only partially met one or more critical job elements OR if the employee fully met all critical job elements but failed to fully meet a substantial number of non-critical job elements. [ ] MS

Fully Satisfactory — This summary appraisal applies if the employee, at a minimum, fully met all critical job elements and virtually all non-critical job elements OR if the employee exceeded all of the critical job elements and fully met a substantial number of non-critical job elements. [ ] FS

Excellent — This summary appraisal applies if the employee exceeded all of the critical job elements and virtually all of the non-critical job elements OR if the employee substantially exceeded all critical job elements and fully met a substantial number of non-critical job elements. [ ] E

Outstanding — This summary appraisal applies if the employee substantially exceeded all critical job elements and virtually all non-critical job elements. [ ] O

Ms. Livengood has been Hearing Assistant Supervisor since April 28, 1985, with a staff of 9 Hearing Assistants. The quality of communication, both within her component and with management, has been poor. This has resulted in a component which is suffering from a lack of leadership and direction. She has failed to establish an effective and efficient system of work flow and work assignments within her component. She fails to recognize priorities; therefore, management is unaware of problems in this area until reports of noncompliance are received from outside sources. Subordinates bypass her in the chain of command because of her inability to provide technical assistance and her inability to clearly communicate when they come to her for assistance. Ms. Livengood's performance in key areas of supervision has been unsatisfactory: communication, providing technical expertise and leadership, and organizing and directing work of subordinates.

Appraising Official's Signature: Marge Carmichael — Marge Carmichael — Date: 11/15/85

Reviewing Official's Comments (as necessary)

Reviewing Official's Signature: Rollie D. Thedford — Rollie D. Thedford — Date: 11-15-85

I understand that my signature below does not indicate that I agree with the appraisal, rather, that I have reviewed appraisal with my supervisor and received a copy.

Employee's Signature: Evelyn I. Livengood — Date: 11-18-85

This employee has received an unsatisfactory or minimally satisfactory summary rating and I certify that I will take appropriate action.

Appraising Official's Signature (i.e., appraising official or reviewing official depending on delegated authority) — Date

Form SSA-1300 (6-84) (SSA Exception to HHS 669 A, B, C)

APPENDIX C

Department of Health & Human Services

Social Security Administration
Office of Hearings & Appeals
Suite 700, Main Place
420 West Main Street
Oklahoma City, Oklahoma 73102

December 18, 1985

Ms. Evelyn I. Livengood
Office of Hearings and Appeals
Suite 700, Main Place
420 West Main
Oklahoma City, OK 73102

Dear Ms. Livengood:

Upon initial appointment to a supervisory position, an employee in this Department is required to complete a probationary period of one year. During this year the probationary supervisor is evaluated in an ongoing manner to determine if the employee is capable of performing the duties of a supervisory position and if they possess the unique skills and abilities inherently required to direct and manage human resources. The success or failure of the agency's programs is dependent to a large extent on the caliber of the Agency's supervisors. Your probationary period as a first line supervisor began on April 28, 1985, upon your appointment to the Supervisory Hearing Assistant position in this office.

[APPENDIX]

At the time of your appointment to the position of Supervisory Hearing Assistant, GS-986-09, you were given a copy of your position description and performance standards which outlined the duties and responsibilities as well as the manner in which the duties and responsibilities were to be performed. I find that those employees under your immediate supervision are concerned about your leadership. You have continued to have problems in managing and communicating with your staff. Your oral instructions have lacked the clarity necessary for your subordinates to have an understanding of their work assignments and priorities. Also, you have failed to establish a system whereby workflow can be controlled. This lack of action has resulted in a lack of control and organization within your component.

You have been counseled about your demonstrated weakness in making day-to-day assignments of work to your staff and providing them with technical guidance and assistance needed to perform their duties. Your unavailability and ineffectiveness in communication has caused your subordinates to seek higher management for direction. In order for supervisors to be effective, they must possess the needed skills and abilities to effectively deal with employees. As a supervisor, it is your responsibility to lead and direct employees and to display exemplary traits to be followed by nonsupervisory employees. Supervisory skills, i.e., assigning, directing, and reviewing work of subordinates; planning, scheduling, and coordinating work operations; planning and carrying out employee development; solving problems; explaining policies, procedures; are unique in that they cannot readily be taught or developed in other kinds of positions. The gap between perceived performance and actual performance is bridged during the probationary period. Therefore, it is incumbent upon the employee to bring certain skills and abilities to the supervisory position. Your inability to effectively manage and communicate with employees has limited your effectiveness as a supervisor to an unacceptable degree.

In view of these facts, I find that I have no choice but to remove you from your supervisory position during your probationary period. You will be assigned to the position of Hearing Assistant, GS-986-8, position number 066437 effective January 5, 1986. This is the same position you occupied before being selected for the Supervisory Hearing Assistant position.

This action to assign you to your former position is not appealable, nor is it grievable under the Department's grievance procedure. However, you may appeal this action to the Merit Systems Protection Board (MSPB) if you feel this action is taken based on discrimination because of marital status or political beliefs. An appeal to MSPB under these circumstances must be submitted to MSPB, Dallas Regional Office, 1100 Commerce Street, RM 6F20, Dallas, Texas, 75242, in writing within twenty (20) calendar days following the effective date of your assignment to the position of Hearing Assistant, GS-986-8. A copy of the MSPB regulations and appeal forms are enclosed.

Should you feel this action resulted from discrimination because of race, color, creed, sex, national origin, religion, physical handicap, or age (provided you are age 40 on the effective date of your assignment to the non-supervisory position), you may file a complaint of discrimination in accordance with the Department's complaints procedures. To do so, you must contact an EEO counselor within 30 calendar days after the effective date of this assignment to the non-supervisory position.

Should you have any questions regarding your rights, you may contact Vivian Mixon, Employee Relations Specialist, DHHS, RPO, 1200 Main Tower Building, Dallas, Texas, 75202, or telephone 214 767-3145 or FTS 729-3145.

[APPENDIX]

s/ Marge Carmichael
Hearing Office Manager

s/ Rollie D. Thedford
Hearing Office Chief
Administrative Law Judge
Concurring Official

Enclosure

I acknowledge receipt of this letter on December 18, 1985.

s/ Evelyn I. Livengood

APPENDIX D

Department of Health & Human Services

Social Security Administration
Office of Hearings & Appeals
Suite 700, Main Place
420 West Main Street
Oklahoma City, Oklahoma 73102

February 14, 1986

Ms. Evelyn I. Livengood
Hearing Assistant
Office of Hearings and Appeals
Suite 700, Main Place
420 West Main
Oklahoma City, OK 73102

Subject:

Stage I Grievance dated December 4, 1985
Stage I Decision of Marge Carmichael, HOM, dated December 18, 1985
Supplement to Stage I Grievance dated January 30, 1986

Due to a change in grievance procedures which took effect November 26, 1985, your Stage I Grievance dated December 4, 1985, and Supplement dated January 30, 1986, are before me for a Stage I decision. The grievance resulted from an unsatisfactory performance appraisal of November 15, 1985, in which relief sought is to have your

appraisal changed to one of fully satisfactory. Supporting documentation submitted with your grievance supplement consists of 1) a Work Flow Charge (undated), 2) Work assignments for your component for July 1, 1985 - December 31, 1985, and 3) a twenty-two page response to the Stage I decision of Marge Carmichael, HOM, who was the appraising official. The issue to be determined by me is whether your Stage I Grievance, your argument in response to Ms. Carmichael's decision, and the work flow charts and work assignments justify granting the relief requested.

While a work flow chart is a management tool, it in and of itself is not proof of satisfactory performance. A supervisor must be able to implement such a plan, while at the same time planning, organizing, directing, and controlling the activities of subordinates. I fail to find that the submission of a work flow chart and your arguments justify a finding of fully satisfactory performance. According, I am denying the relief sought, i.e., to have your performance appraisal changed to one of fully satisfactory, based on a finding of insufficient supporting evidence.

According to your statements, any inability to perform satisfactorily was due to interference by management. It is essential that a supervisor be a team player and keep in perspective how his/her component fits into an organization's mission and recognize that management decisions are not made to make one component look good at the expense of another, as alleged in your grievance. It should be noted that you rarely voluntarily consulted with me on matters regarding your component, despite my requests that you do so. You were counseled on numerous occasions about my dissatisfaction with the performance of your component, and specifically your supervisory role.

Shortly after your promotion, I became concerned about your lack of progress in organizing your component, whereupon I decided to assign you a 20-case docket to prepare and schedule. It was my intent that working a docket would enable you to plan and organize work flow through your component. I did not consider assigning you a 20-case docket a burdensome task, although you have stated that you worked on this docket "the months of May and June and even into July," a period of some two to two and one-half months. This is significantly below the performance standards of a Hearing Assistant, who is required to prepare between 40 and 49 cases per month for a fully satisfactory performance rating. In comparison, a Supervisory Hearing Assistant with nine subordinates is expected to prepare a minimum of 16 cases per month to be rated fully satisfactory.

I also agreed to forego medical summaries on my cases, although I had required medical summaries on my cases for years. You were requested to prepare them on the docket I assigned you, and on dockets assigned to me under the unit system. However, in July I reluctantly discontinued this practice for two reasons: 1) Under reorganization I wanted standardization, which meant requiring them on all cases or none, and 2) to reduce the backlog of cases in your component by allowing Hearing Assistants to concentrate their efforts on pulling cases. This was intended as a temporary measure to assist your component.

You had provided management with a workload report showing your component had 308 unpulled cases as of July 23, 1985 (Attachment A). In early August, we learned from the regional office that we were to receive a 30-case Seattle docket, which prompted a request to the regional office for assistance in case preparation. Yet, you state this decision was made without consulting you and you feared your component would run out of work, a highly unlikely probability in view of your report of July 23, 1985, and the August Workload Report. At the

[APPENDIX]

end of August, you had the following caseload pending in your component: 460 unassigned cases over 30 days, 331 unscheduled cases over 45 days, and 111 unheard cases over 90 days (Attachment B). I wish to state that outside assistance is never requested unless a component's workload justifies it based on input from that component's supervisor.

You also stated that you were not allowed to prepare dockets according to your system, that is to have one Hearing Assistant work on only one docket at a time for one Administrative Law Judge. I would like to note for the record that this is the procedure we followed for years in preparing cases under the unit system. The purpose of reorganization was to implement new procedures which would allow for more efficient processing of cases.

As previously stated, the above attempts were intended to assist you, not interfere, as stated in your grievance. Although you have raised other issues, I feel they are irrelevant insofar as justifying the relief requested; therefore, my decision is to deny the relief requested, to change your appraisal to fully satisfactory. My decision is appealable to the Stage II official, Acting Regional Chief Administrative Law Judge Larry M. Weber. Your appeal should be in writing and forwarded to the Stage II official within 14 calendar days after receipt of the Stage I decision.

s/ Rollie D. Thedford
Hearing Office Chief
Administrative Law Judge

Attachment A - HA Workload Report

[APPENDIX]

Attachment B - August 1985 Monthly Workload Report

cc:
Larry M. Weber, Acting RCALJ
Office of Hearings & Appeals, SSA
Room 14B7
Earle Cabell Federal Building
1100 Commerce Street
Dallas, Tx 75242

Andrew Hickam, RMO
Office of Hearings & Appeals, SSa
Room 14B7
Earle Cabell Federal Building
1100 Commerce Street
Dallas, TX 75242

I acknowledge receipt of this letter on February 18, 1986.

s/ Evelyn I. Livengood
Hearing Assistant

APPENDIX E

FILED
October 17, 1986
Robert D. Dennis
Clerk, U. S. District Court
By: Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2314 A
	)	
ROLLIE D. THEDFORD,	)	
	)	
Defendant.	)	

COMPLAINT

Comes now Plaintiff and for cause of action against the Defendant, alleges and states:

This complaint is detailed and lengthy, but necessary to fully apprise the court of plaintiff's claims.

First Claim for Relief

1. This matter arises under the Constitution of the United States, Amendment Five (5), and on those regulations which afford plaintiff exemption from probationary employment, and the amount involved exceeds the sum of $10,000.00

2. The action arises in the Office of Hearings and Appeals of the Social Security Administration in Oklahoma City, Oklahoma.

—The office is staffed by:

(a) Hearing Office Chief Administrative Law Judge and 7 other Administrative Law Judges;

(b) An Office Manager;

(c) Ten Hearing Assistants, one of which is supervisor, whose function is to prepare cases for hearing by the Administrative Law Judge;

(d) Hearing Clerks, one of which is the supervisor, whose function is to take and record evidence at such hearings;

(e) Eight Decision Writers, one of which is the supervisor, whose function is to prepare final order as directed by the Administrative Law Judges.

3. Plaintiff comes to this court because there is no other forum where plaintiff may receive a hearing or in which plaintiff may have redress for the wrong hereinafter described. Plaintiff has exhausted all government agency procedures and has received no hearing or redress.

4. Plaintiff is a thirty (30) year permanent career employee with satisfactory service ratings during such time of service and has been

advanced continually to more important and responsible positions. But now, because of the defendant's action, that advance has ended.

5. Plaintiff was, on April 30, 1985, promoted from the position of Hearing Assistant (HA) to Supervisory Hearing Assistant (SHA). However, she was unable to begin on the supervisory duties until July of 1985. The promotion was stated to be probationary for a period of one (1) year. However, within three-and-one-half months (3½) months, she was removed and demoted back to the position of Hearing Assistant, based upon an unsatisfactory appraisal, which plaintiff alleges was arbitrarily and capriciously made by an abuse of power, and made for the very reason or excuse to replace her in the position without any opportunity to defend herself against such action.

6. Plaintiff filed a grievance according to procedure outlined by Health and Human Services Instruction 771-3 (HHS Personnel Instruction 771-3), and the answers thereto afforded no redress or hearing to defend herself.

7. Rehearing petition was filed as follows:

Date: April 10, 1986

To: Department of Health and Human Services
Director, Office of Human Relations
Office of the Assistant Secretary for
Personnel Administration, OS
505-E Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C.20201

From: Evelyn I. Livengood

Subject: Request for reconsideration of grievance re unsatisfactory appraisal while in position of Supervisory Hearing Assistant, and grievance re improper demotion from Supervisory position of Supervisory Hearing Assistant

to Hearing Assistant based on unsatisfactory performance.

ISSUES

(1) Whether Grievant was granted proper and adequate training assistance when promoted from Hearing Assistant to Supervisory Hearing Assistant.

(2) Whether Grievant was granted fair, good faith and equitable treatment in the position of Supervisory Hearing Assistant before being removed to Hearing Assistant, which removal was based upon the unsatisfactory appraisal and before grievance thereon was heard.

(3) Whether there has been a deprivation of Grievant's constitutional rights in the removal process and demotion to Hearing Assistant of:

—procedural due process rights

—property interest.

(4) Whether Grievant should have an exemption from serving as a probationer.

DETAILED FACTS

8. Promotion Date: On or about April 28, 1985, plaintiff was promoted from the position of Hearing Assistant in the Oklahoma City Office of Hearings and Appeals to the position of Supervisory Hearing Assistant. The promotion was in writing and was stated to be probationary.

9. Assumption of Duties: However, in actual fact, plaintiff was unable to assume such supervisory duties because:

[APPENDIX]

(a) The Hearing Office Chief Administrative Law Judge (HOCALJ) instructed and demanded plaintiff to pull cases, which took her away from assuming her duties as a Supervisory Hearing Assistant.

(Pull cases means taking a case file from incoming case files and then obtaining all proper instruments and exhibits to be placed therein before being placed in a docket file)

(Docket file means the group of files that have been compiled and placed together for hearing by an Administrative Law Judge, ALJ, at some specified place and time)

(b) Therefore, plaintiff had to work as a Hearing Assistant during the months of May, June and into July, 1985, and was unable to assume her duties of Supervisory Hearing Assistant.

(c) Plaintiff only functioned in the position of Supervisory Hearing Assistant during the months of August, September, October and until November 15, 1985 (3½ months).

10. No Instruction Received. During the above three and one-half months (3½) months, and before being given an unsatisfactory rating,

(a) No Personal Improvement Plan was established;

(b) No opportunity was given to improve performance;

(c) No instructions were received from management;

(d) No guidance procedure was made available;

(e) No training course was made available;

(f) No training procedure was made available;

(g) No counseling was made available;

(h) Thirty (30) days after unsatisfactory appraisal, plaintiff was removed;

and, therefore, plaintiff alleges:

— THERE WAS NOTHING UPON WHICH AN APPRAISAL OF WORK COULD BE MADE IN SUCH A SHORT TIME; I.E., 3½ MONTHS.

11. New Position. The position of Supervisory Hearing Assistant was a new position inaugurated in April of 1985, the very month plaintiff was promoted. She was given only a job description which required the Supervisory Hearing Assistant to function in the positions of Supervisory Hearing Assistant, Hearing Assistant and even Hearing Office Manager. No other guidance instruction on training was made available. Therefore, as the Supervisory Hearing Assistant, she had to devise a system for operation:

— which she did by making a work flow plan on her own time, which was submitted to the Hearing Office Chief Administrative Law Judge and the Hearing Office Manager within the 3½ months' time.

12. Disruption of Work Flow. In addition to the statements of paragraph 9 above, plaintiff alleges:

(a) The Hearing Office Chief Administrative Law Judge began instructing that all Hearing Assistants be assigned to work on only one docket at a time for one Administrative Law Judge, regardless of others,

instead of following the work flow plan submitted by plaintiff, which would have had all Hearing Assistants working on dockets for all Administrative Law Judges, giving attention to the oldest case first so that each Administrative Law Judge would have a docket ready for hearing. This would have taken a little time, but it would have led to a smooth flow of hearings on cases instead of having one Administrative Law Judge with a docket while others waited.

(b) This disrupted the flow and efficient working of plaintiff's component of Hearing Assistants and denied plaintiff time to put into operation the efficient system of a supervisor; i.e., turmoil was created by the Hearing Office Chief Administrative Law Judge because he would not allow the plan to be put into operation, and then he BLAMED THE PLAINTIFF FOR THE DISORGANIZATION WHICH HE CREATED.

(c) Plaintiff was instructed by the hearing Office Chief Administrative Law Judge to have a scheduling component made up out of the Hearing Assistants, then received instruction from the Hearing Office Manager for plaintiff to figure out the method of how and who would make up the scheduling component.

(Scheduling component means those persons who are assigned to schedule for hearing the dockets above at the places and times scheduled)

Therefore, plaintiff, in following the instruction, determined to try having each Hearing Assistant, after making up dockets of cases for whichever Administrative Law Judge would be assigned to the docket area, move to scheduling that docket, then move to working dockets, all for a variation of work so that each Hearing Assistant would always be efficient in both; i.e., scheduling and working case dockets. However, the Hearing Office Manager stated to the Hearing Assistants and others, but not to plaintiff, that she, the Hearing Office Manager, would not go along with such system and said she wanted the system to remain with no variation, and changed the system without even going through plaintiff and without plaintiff's knowledge until after the change took place.

(d) Then the Hearing Office Manager instructed plaintiff in July, 1985, to assign two (2) Hearing Assistants to assist the Hearing Clerks with post-hearing development.

(Post-hearing Review or Development means completing a case after it has had a hearing before an Administrative Law Judge and has been returned to the office for additional work)

Then, in August, 1985, plaintiff lost one (1) Hearing Assistant who transferred to another area, leaving nine (9) Hearing Assistants, then with two doing scheduling and one assigned to post-hearing review to determine whether or not everything had been completed in the hearing and whether the case required some post-hearing development or decision, this took out five (5) Hearing Assistants, leaving

only four (4) under the Supervisory Hearing Assistant to prepare cases for hearings and dockets. This reduced the Supervisory Hearing Assistant's component by 55%, and the Hearing Office chief Administrative Law Judge complained that cases were not prepared fast enough and BLAMED THE SUPERVISORY HEARING ASSISTANT, the plaintiff, when he had reduced the capacity of the Supervisory Hearing Assistant to perform.

(e) Therefore, plaintiff alleges:

— THE DISRUPTION OF WORK FLOW AND EFFICIENCY WAS NOT THE FAULT OF THE PLAINTIFF, BUT THE FAULT OF THE MANAGEMENT WITH PLAINTIFF BEING IN THE POSITION TO RECEIVE ALL BLAME, OR BEING THE FALL GUY FOR THE INEFFICIENCY CAUSED BY THE MANAGEMENT.

(f) All the above was going on in the three and one-half (3½) month period over which the Hearing Office Manager and the Hearing Office Chief Administrative Law Judge determined that plaintiff's component of Hearing Assistants was not working in a satisfactory manner, and plaintiff was to blame.

13. Performance Appraisal. By the job description of Supervisory Hearing Assistant, plaintiff is responsible to perform the function of:

"coordinates with the Administrative Law Judge... concerning matters of work accomplishment, priorities and procedures."

Nevertheless, plaintiff alleges:

— plaintiff was instructed by the Hearing Office Chief Administrative Law Judge not to coordinate anything with the Administrative Law Judges because the Hearing Office Chief Administrative Law Judge was running the office and not the Administrative Law Judges, and such instruction to plaintiff not to fulfill this function led to more confusion and inefficiency.

14. Principles Set Forth by Government. According to the Federal Personnel Guide of 1984 covering Employment, published annually by Federal Personnel Publications, government sets forth the following principles and purposes:

— To ensure the merit system is observed and has been put into law and they require:

(i) Fair and equitable treatment in all personnel management...and with proper regard for... constitutional rights;

(ii) High standards of integrity, conduct and concern for the public interest;

(iii) Efficient and effective use of the federal work force;

(iv) Improved performance through effective education and training;

(v) Protection of employees from arbitrary action

[APPENDIX]

Plaintiff alleges:

—

SHE WAS NOT GIVEN THIS FAIR AND EQUITABLE TREATMENT, WAS NOT GIVEN ANY EDUCATION OR TRAINING, AS ADVERTISED.

UNDER CONSTITUTION

15. Public employees' protection against wrongful demotions are derived from the Fifth Amendment and are generally protected from:

(a) deprivation of a property interest;

(b) deprivation of a liberty interest;

(c) deprivation observed in procedure;

(d) deprivation observed in substance.

Plaintiff alleges:

— THESE DUE PROCESS RIGHTS WERE NOT OBSERVED OR GIVEN.

16. Procedural due process rights include:

(a) Notice of the proposed action and grounds asserted for it;

(b) An explanation of the employer's evidence;

(c) An opportunity to present reasons why the proposed action should not be taken; i.e., to present the employee's side of the story.

17. Deprivation of property interest.

Plaintiff alleges that:

(a) Because procedural due process was not met, the property interest has not been considered.

(b) Since the principles set forth by government and the responsibilities of management as stated above require:

(i) fair dealing

(ii) guidance and assistance to new supervisor

(iii) instruction

(iv) technical advice

(v) training

plaintiff is entitled to receive these services before there should be any consideration or action of unsatisfactory appraisal or removal from the position of Supervisory Hearing Assistant, and

(vi) by not considering them, and

(vii) by not giving plaintiff opportunity to respond plaintiff has been denied whatever property right she would have in the position, and

(viii) denial of these considerations is also denial of due process.

(c) Once the promotion from Hearing Assistant to Supervisory Hearing Assistant had been given, plaintiff had a constitutional right in line with the

[APPENDIX]

principles set forth by government above, to have ample time to meet all requirements, and by denying to plaintiff the responsibilities of management set forth above, plaintiff has been denied an opportunity to meet the requirements.

(d) Until management has met its responsibilities, there can be no consideration of cause for removal.

(e) All actions of government management must meet all requirements of constitutional due process in action involving any employee, regardless of what regulations say; i.e., all regulations must be measured by the constitution, and the reason for probation is to give an employee a fair and equitable chance to meet probation, and a three and one-half month time, accompanied with the confusion and interference which plaintiff experienced, out of 12 months, is not that ample time.

(f) When even government regulations set forth responsibilities for government management, there arises an implied promise or agreement with the probationary employee that removal cannot occur or be considered until government management has performed, and only then can cause for removal be considered.

17. Substantive Due Process Right.

Plaintiff alleges that:

(a) she is not the usual type of probationary employee, but has served for 30 years with government and has never received an unsatisfactory appraisal and the present unsatisfactory appraisal and demotion is a deprivation of substantive due process in that:

— she has been denied a due process hearing;

(b) She has been damaged in her reputation as a good, capable and satisfactory government employee, and the record made against her will follow her through her career;

(c) She has been denied an opportunity:

— to show that procedures followed by management were inadequate in determining whether the predicate for termination of employment as Supervisory Hearing Assistant existed;

— to show that the unsatisfactory appraisal was made, not upon substantive valid reasons, but for the purpose of terminating her as a Supervisory Hearing ASsistant only.

Second Claim for Relief
RE: PROBATION

18. Plaintiff alleges and shows the court that HHS Instruction 315-2-40 says:

(a) Employees who were serving or had served a supervisory or management position in the Federal Government on or before August 10, 1979, are ex-

[APPENDIX]

empt from serving a probationary period for supervisors. A former supervisor is not required to serve supervisory probation, and a former manager is not required to serve either supervisory or managerial probation.

19. Plaintiff alleges that:

(a) She served as an office manager with management and supervisory duties for a period of service from 10/26/75 to 9/3/77;

(b) And she should have been granted exemption from probation as Supervisory Hearing Assistant.

APPEALS

20. Plaintiff alleges that Regulations 315-2-90 Appeals, says:

(a) an action to return a supervisory...probationary employee to a non-supervisory...position

(i) is not appealable

(ii) is not grievable

— under department's grievance procedure.

(b) The same regulations place responsibilities upon management to:

— train

— assist

— develop

— instruct

— guide

supervisors who are in probation, and

(c) Therefore, this is saying there is an ambiguity between regulation and what government advertises, and management is not accountable and are unrestrained in what they do, in spite of the

(i) Principles of government set out above, and

(ii) The constitution of the United States, Amendment V, requirement of procedural due process of:

— notice

— opportunity to present reasons why the proposed action should not be taken

— right to present evidence

— right to call witnesses

— right to know opposing evidence

— right to cross-examine witnesses

— right to counsel

— right to record being prepared on evidence

— right to finding of fact in writing prepared from evidence,

and plaintiff has no redress through government channels and must seek redress through the United States District Court.

WHEREFORE, plaintiff prays for damages from defendant:

1. For loss of earnings; i.e., the difference between the pay for a Supervisory Hearing Assistant of $26,166.00, and that of a Hearing Assistant of $24,346.00, from the time demoted of 1/5/86 until retirement upon reading her 65th birthday, or 144 months at $1820.00 per month, or $262,080.00

2. For exemplary damages for defendant's arbitrary, capricious and unauthorized action by abusing his discretion as above alleged in the amount of $50,000.00

3. For emotional distress and mental anguish in the amount of $50,000.00

4. For Damage to her 30-year reputation as a capable, steady and reliable employee being destroyed in the amount of $50,000.00

s/ Evelyn I. Livengood, Plaintiff

s/ Larry Sizemore, OBA #8283
Attorney for Plaintiff
1400 S.W. 89th Street
Oklahoma City, OK 73159
(405) 691-3353

APPENDIX F

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: **MEMORANDUM**

Date: January 10, 1987

From: Hearing Office Manager

Subject: Lawsuit - Evelyn Livengood vs. Rollie Thedford

To: All Employees

I was contacted by Mary Smith, Attorney with the Department of Justice, who requested that employees be notified that they are not to honor any subpoenas unless notified by her. Also, employees are not to talk with plaintiff's counsel without Ms. Smith present.

s/ Marge Carmichael

APPENDIX G

FILED
January 29, 1987
Robert D. Dennis
Clerk, U. S. District Court
By: Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2314-A
	)	
ROLLIE D. THEDFORD,	)	
	)	
Defendant.	)	

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Comes now the Defendant Rollie D. Thedford, by William S. Price, United States Attorney, and Mary M. Smith, Assistant United States Attorney, and moves the Court to dismiss Plaintiff's complaint herein pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted.

In the alternative, Defendant requests that the Court grant summary judgment pursuant to Rule 56(b) for the reason that upon the pleadings and transcript of the record, there is no genuine issue of material fact, and the defendant is entitled to a judgment as a matter of law.

In support of said motions Defendant submits the attached brief and affidavit.

Respectfully Submitted
WILLIAM S. PRICE
United States Attorney

s/ Mary M. Smith
Assistant United States Attorney
Western District of Oklahoma
U.S. Courthouse and Federal Bldg.
200 N.W. Fourth St., Rm. 4434
Oklahoma City, OK 73102

Attorneys for Defendant
Rollie D. Thedford

OF COUNSEL:

Gayla Fuller
Chief Counsel
Arnold S. Battise
Assistant Regional Counsel
Office of the General Counsel
Department of Health and Human Services
1200 Main Tower, Suite 1330
Dallas, Texas 75202

APPENDIX H

FILED
February 12, 1987
Robert D. Dennis
Clerk, U. S. District Court
By: Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2314-A
	)	
ROLLIE D. THEDFORD,	)	
	)	
Defendant.	)	

ORDER

This case is before the Court for consideration of defendant's Motion for a Protective Order and plaintiff's response. Defendant filed its motion after plaintiff gave notice of the taking of depositions of over forty witnesses, including seven administrative law judges, commencing on February 12, 1987. Defendant requests that discovery in this action be stayed pending resolution of his Motion to Dismiss or in the Alternative for Summary Judgment, arguing that such discovery (1) is not necessary to resolution of the motion, (2) is unduly burdensome to the operation of a government agency and (3) is intended to harass government employees rather than ascertain facts to oppose defendant's motion.

To support the taking of the depositions, plaintiff initially supplied only an affidavit stating that the depositions are "essential" to support her petition and to withstand the defendant's Motion to Dismiss or in the Alternative for Summary Judgment. In response to the instant motion, plaintiff filed affidavits tending to show that so extensive a set of depositions would not burden the public service, but still has not demonstrated with any particularity the need for the testimony of specific witnesses in order to resolve the issues raised by the defendant's motion.

Rule 26(c), Fed. R. Civ. P., provides that the Court may issue a protective order which justice requires to protect a party from "annoyance..., oppression, or undue burden...." The rule is designed to afford judicial control over blunderbuss deposing. The Court has carefully considered the materials submitted in response to the instant motion, which obviously were not individually prepared by the affiants and declarants, and finds not withstanding those materials that the proposed deposition schedule is oppressive, burdensome, and contrary to the public interest.

Defendant's Motion for a Protective Order is granted as follows:

1. Plaintiff's discovery from Judges O'Bryan, Gossett, Darks, Marrs, Bennett, Wampler and (if served) Martin will be taken, if at all, on written questions and not oral examination. Each set of questions to a witness will not exceed thirty in number in plaintiff's direct examination. Plaintiff shall serve direct examination questions on defendant no later than February 24, 1987. Defendant will have fifteen days from such service to serve cross questions. Plaintiff will have five days after such service to serve redirect questions. Recross questions may be served only by leave of Court; see F. R. Civ. P. 26(c)(3), 31.

2. Not more than eight additional witnesses may be deposed on oral examination, provided, that before those depositions are noticed but not later than February 24, 1987, plaintiff must provide to the Court

and counsel for defendant a summary of the witnesses' expected testimony, and the basis on which plaintiff's counsel expects it.

Disposition of defendant's Motion to Dismiss or for Summary Judgment is continued for sixty days after the date of this order.

Defendant may submit for costs as to the Motion for Protective Order, see F. R. Civ. P. 26(c), 37(a)(4), not later than February 20, 1987.

s/ Wayne E. Alley
United States District Judge

APPENDIX I

FILED
United States Court of Appeals
Tenth Circuit
July 13, 1987
Robert L. Hoecker
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EVELYN I. LIVENGOOD,	)	
	)	
Plaintiff-Appellant,	)	
	)	Nos. 87-1231 &
vs.	)	87-1278
	)	(D.C. No. 86-2314-A)
ROLLIE D. THEDFORD,	)	(W.D. Okla.)
	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT

Before LOGAN and TACHA, Circuit Judges, and O'CONNOR, District Judge.*

After examining the briefs and the appellate records, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. See

---

* The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The causes are therefore ordered submitted without oral argument.

These matters are before the court on plaintiff's motion to consolidate and defendant's motion to dismiss for lack of appellate jurisdiction. Plaintiff appeals from two orders of the United States Court for the Western District of Oklahoma, the first granting defendant's motion for a protective order under Fed. R. Civ. P. 26 (Appeal No. 87-1231) and the second denying plaintiff's subsequent motion for certification of that order under 28 U.S.C. §1292(b) (Appeal No. 87-1278).

Generally, orders granting or, as in this case, denying discovery are interlocutory and not appealable except as part of the final decision disposing of the case on the merits. In re Sessions, 672 F.2d 564, 566 (5th Cir. 1982); International Union v. National Caucus of Labor Comms., 525 F.2d 323, 324 (2d Cir. 1975). This court at one time recognized an exception to this general rule, see Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 996 (10th Cir.), cert. denied, 380 U.S. 964 (1965), which has been applied in a context similar to that presented here. See In re Westinghouse Elec. Corp., 570 F.2d 899, 901 (10th Cir. 1978). However, we have more recently indicated that the Covey Oil case has been indirectly overruled by the Supreme Court and no longer provides a viable exception to the rule of nonappealability. See FTC v. Alaska Land Leasing, Inc., 778 F.2d 577, 578 (10th Cir. 1985). Accordingly, plaintiff's appeal from the order granting defendant's motion for a protective order must be dismissed.

Plaintiff's appeal from the district court's order denying §1292(b) certification must similarly be dismissed, as such an order is also not immediately appealable. See In re Master Key Antitrust Litig., 528 F.2d 5, 8 (2d Cir. 1975); cf. Makuc v. American Honda Motor Co., 692 F.2d 172, 173-74 (1st Cir. 1982) (denial of a motion for certification under Fed. R. Civ. P. 54(b) is not appealable).

Defendant's motion is GRANTED and these appeals, Nos. 87-1231 and 87-1278, are DISMISSED.

In light of our disposition, plaintiff's motion to consolidate the two appeals is DENIED as moot.

The mandates shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX J

FILED
July 28, 1987
Robert D. Dennis
Clerk, U. S. District Court
By: Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2314-A
	)	
ROLLIE D. THEDFORD,	)	
	)	
Defendant.	)	

ORDER

This case is before the Court pursuant to an order entered by the Court of Appeals on July 13, 1987. In that order, the Court of Appeals dismissed the plaintiff's appeal of this Court's Protective Order, filed February 12, 1987. This Court now has jurisdiction over the case and will proceed to a consideration of the pending motions.

The record indicates that two motions are now pending: (1) the defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, filed on January 29, 1987; and (2) the defendant's Motion for Costs filed on February 20, 1987. The plaintiff filed a Notice of Appeal of the Court's Protective Order on February 13, 1987 and has not yet responded to either of the defendant's motions.

Accordingly, the plaintiff is directed to respond to the defendant's Motion for Costs no later than August 7, 1987. The plaintiff is also directed to respond to the defendant's Motion to Dismiss or in the Alternative for Summary Judgment not later than August 7, 1987. The latter motion (the one filed on January 29, 1987) will at this time be treated only as a Motion to Dismiss, and the plaintiff should respond to it accordingly. These motions will be heard on the Court's August 10, 1987 Motion Disposition Docket at 10:45 a.m.

In addition, the procedure set out in the Court's Protective Order of February 12, 1987 for the service of the written questions prepared by the plaintiff and addressed to the administrative law judges is now reinstated. The Court received a letter from the plaintiff's attorney, dated July 21, 1987, with these written questions attached. In this letter, the plaintiff's attorney states that these written questions have been served on the defendant through his attorney but does not indicate when these questions were served. Accordingly, defendant's counsel will have fifteen days from the date of this order to serve cross questions upon the plaintiff's attorney. The plaintiff's attorney will then have five days after such service to serve redirect questions. Recross questions may be served only by leave of court, see F.R. Civ. P. 26(c)(3), 31. Upon the conclusion of this time period, the plaintiff's attorney shall serve all of these questions upon the administrative law judges.

In his letter of July 21, 1986, the plaintiff's attorney has also provided a summary of the expected testimony of witnesses other than the administrative law judge in question. Therefore, pursuant to the Court's Protective Order of February 12, 1987, the plaintiff will be allowed to depose eight additional witnesses by oral examination.

Finally, disposition of the defendant's motion of January 29, 1987, treated as a summary judgment motion, is continued. The plaintiff is directed to file its response to this summary judgment motion not later than sixty days from the date of this order.

It is so ordered, this 24th day of July, 1987.

s/ WAYNE E. ALLEY
United States District Judge

APPENDIX K

FILED
August 21, 1987
Robert D. Dennis
Clerk, U. S. District Court
By:Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2314-A
	)	
ROLLIE D. THEDFORD,	)	
	)	
Defendant.	)	

MOTION FOR PROTECTIVE ORDER

Plaintiff states that pursuant to the Protective Order of February 11, 1987, and Order of July 24, 1987, limiting plaintiff to discovery by deposing eight (8) witnesses and written interrogatories from the Administrative Law Judges, plaintiff furnished to defendant and to court the names of the eight (8) witnesses, along with a summary of the witnesses' expected testimony. The depositions were to be taken in the Office of Hearings and Appeals beginning on Tuesday, August 25, 1987 at 8:30 a.m.

Plaintiff comes before the court this 21st day of August, 1987, and would show the court the plaintiff has just learned this morning that defendant has called a pre-deposition conference (see attached Exhibit)

and intends to interrogate each of the eight (8) witnesses this afternoon and to record such interrogating, when plaintiff or counsel has heretofore been denied the privilege of speaking with such witnesses and the witnesses ordered not to talk with plaintiff's counsel. Now to allow such interrogation of the witnesses would not only be unfair to plaintiff but would be, in plaintiff's opinion, subtle intimidation of the witnesses. The witnesses have heretofore indicated they do not wish to give testimony except under subpoena and oath for their protection. And now, even though defendant may state to the witnesses that their interrogation would be voluntary, such witnesses being directly under the dominant jurisdiction of defendant and fearful that the same that has happened to plaintiff could happen to them unless they cooperate, how could they refuse because to refuse could be interpreted as not cooperating with defendant.

Plaintiff would state to the Court that defendant's intentions may go beyond intimidation and amount to attempting to influence or tamper with witnesses. It is really plaintiff who is calling witnesses and not defendant, and if anyone should be allowed the privilege of speaking with them ex-parte, it should be plaintiff.

Plaintiff requests the Court to issue an Order against the defendant or counsel and to prevent the interrogation of the eight (8) witnesses so that they, and plaintiff, be protected and the witnesses be directed to give testimony only under oath and not ex-parte.

Plaintiff further requests that the depositions be taken outside of the Office of Hearings and Appeals, and be taken before the FREE LANCE REPORTERS, INC., 200 N. Harvey, 400 Park-Harvey Center, Oklahoma City, Oklahoma, beginning at 8:30 a.m. Tuesday, the 25th day of August, 1987, as follows:

Carol Eaton	8:30 a.m.	8/20/87
Janice Hunnicutt	10:00 a.m.	8/20/87
Shelbia (Shelby) Lookabaugh	1:30 p.m.	8/20/87

LaRene Miller	3:00 p.m.	8/20/87
Sandara Babb	8:30 a.m.	8/26/87
Trela Willoughby	10:00 a.m.	8/26/87
Vonda Robbins	1:30 p.m.	8/26/87
Marjorie (Marge) B. Carmichael	3:00 p.m.	8/26/87

and the reporter may contact each Administrative Law Judge and determine the time convenient to them beginning on August 25, 1987, unless the Judges choose to write out their answers without aid of a reporter.

RESPECTFULLY SUBMITTED,

s/ Evelyn I. Livengood, Plaintiff

s/ Larry Sizemore, OBA #8283
Attorney for Plaintiff
1400 S.W. 89th Street
Oklahoma City, OK 73159
(405) 691-3353

Certificate of Mailing

This is to certify that a true and correct copy of the above and foregoing Motion was delivered this 21st day of August, 1987, to:

Mary M. Smith
Assistant U. S. Attorney
200 N.W. Fourth, Room 4434
Oklahoma City, OK 73102

Mr. Mort G. Welch
Attorney at Law
Colcord Building
Oklahoma City, OK 73102

s/ Larry Sizemore

[APPENDIX]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: **MEMORANDUM**

Date: August 20, 1987

From: Rollie D. Thedford
Hearing Office Chief Administrative Law Judge s/R.T.

Subject: Depositions

To: Staff Members Named Below

Attorneys for the plaintiff in the case of Livengood vs. Thedford have requested permission to take depositions on Tuesday and Wednesday, August 25 and 26, 1987. The persons to appear are:

Janice Hunnicutt
Sandra Babb
Carol Eaton
Shelby Lookabaugh
LaRene Miller
Trela Willoughby
Marge Carmichael
Dorothy Lawson

The attorneys for the defendant have arranged for pre-depositional conferences with each of you commencing at 2 pm on Friday, August 21, and Monday, August 24. You are not required to respond against your will for pre-depositional conference purposes with attorneys on either side of the litigation. you are, however, required to appear for depositional purposes as above stated.

APPENDIX L

FILED
August 25, 1987
Robert D. Dennis
Clerk, U. S. District Court
By:Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2314-A
	)	
ROLLIE D. THEDFORD,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court for consideration of the plaintiff's Motion for a Protective Order. The plaintiff objects to pre-depositional conferences, scheduled for August 21, 1987 and August 24, 1987 by the defendant's attorneys.

The defendant's attorneys seek to confer with witnesses that the plaintiff has sought to depose. The depositions are scheduled for August 25, 1987 and August 26, 1987. The plaintiff requests the Court to prevent the defendant's attorneys from questioning these witnesses until the scheduled depositions.

The plaintiff argues that the witnesses may be intimidated and improperly influenced at these pre-depositional conferences. The Court finds that this possibility does not justify the granting of a protective order. The notice of the pre-depositional conferences informs the witnesses that they are not required to respond against their will. The testimony at the scheduled depositions will be given under oath, and plaintiff's counsel will have the opportunity to examine these witnesses then. No annoyance, embarrassment, oppression, or undue burden or expense has been shown to inhere in these conferences. Federal Rule of Civil Procedure 26(c). Accordingly, the plaintiff's Motion for a Protective Order is denied.

Dated this 24th day of August, 1987.

s/ WAYNE E. ALLEY
United States District Judge

APPENDIX M

FILED
October 26, 1987
Robert D. Dennis
Clerk, U. S. District Court
By:Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2314-A
	)	
ROLLIE D. THEDFORD,	)	
	)	
Defendant.	)	

RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

Defendant's Motion for Summary Judgment was filed 1/29/87, and plaintiff was given until October 26, 1987, to respond thereto.

In defendant's removal letter of 12/18/85, in which plaintiff was removed from her position of Supervisory Hearing Assistant, and after, she claims, being able to function in such position only 3½ months, and then she was assigned to her former position of Hearing Assistant. Plaintiff claimed that:

1. She was given no notice of the removal, or given a chance to refute the same by presenting evidence of her own to show that such removal was unfounded.

2. In the promotion, she had been given no instructions by management or any guidance procedure or training to aid her in this new position.

In the removal letter, it was claimed that:

— she lacked leadership,
— was unable to give clear oral instructions to subordinates,
— failed to establish the work flow, and
— failed to control her organization,
— she was unable to give day-to-day assignments of work,

and in a subsequent letter by the defendant, dated 2/14/86, it was claimed:

— she did not seek counseling from the defendant,
— that defendant had given her a 20-case docket so she could learn to plan and organize work flow through her component,
— that defendant desired standardization,
— in effect implying that plaintiff was unable to put in the work flow of standardized procedures.

In refuting these claims, plaintiff took depositions of six Hearing Assistants, the Office Manager, and five Administrative Law Judges. Those depositions revealed the following:

1. All Hearing Assistants from whom depositions were taken have been employed as Hearing Assistants for approximately six years each, having worked under the unit concept system and a little interim period between that and the reconfiguration, and in reconfiguration, and after such time, are well qualified to know what they were doing without needing any supervision. We have here a Hearing Assistant, the plaintiff, who was employed as a Hearing Assistant for some nine years, being promoted to Supervisory Hearing Assistant, and each Hearing

Assistant doing the exact same work as plaintiff was doing, and now for plaintiff to attempt to tell the other Hearing Assistants how they should do their work after having done it for six years would create a little bit of dissension if she had tried to direct them. The only thing in this situation that plaintiff could do was to wait until a Hearing Assistant came to plaintiff for some assistance. Otherwise, they would resent her suggestions. See:

Eaton deposition:
p. 5, line 11 - employment time 6 years

Miller deposition:
p. 5, line 9 - employment time 6 years

Babb deposition:
p. 4, line 20 - employment time 6 years

Hunnicutt deposition:
p. 3, line 17 - employment time 4 years

Lookabaugh deposition:
approximately ten years, but the question was not asked her.

Willoughby deposition:
p. 5, line 17 - employment time 6 years

2. The standard way of preparing cases by the Hearing Assistants whereby they:

(a) pulled cases (which meant pulling the exhibits from the file as it was received from the district Social Security office, and arranging them in an exhibit file and numbering each exhibit);

(b) determined issues of that case;

(c) scheduled that case for hearing by an Administrative Law Judge,

never changed under the old system of unit concept where an individual judge had his own team of staff, comprising one or more Hearing Assistants and one or more Hearing Clerks, and under the new system of reconfiguration, which went into effect about July, 1985, in which the judge no longer had his staff, but had to depend upon all Hearing Assistants placed in a pool or component of Hearing Assistants, such Hearing Assistants doing the identical type of case preparation, but without preparing them for a specific judge, but for an area to which any judge may be assigned, and a pooling of the Hearing Clerks, and then taking some Hearing Assistants from their usual function of a Hearing Assistant and assigning them to scheduling of cases for hearing only for a period of time. See:

Eaton deposition:
p. 9, lines 14-25
p. 10, lines 1-10
p. 10, lines 20-25
p. 11, lines 1-11
p. 15, lines 20-25 and had little supervision by the judge under the unit system,
p. 16, lines 8-14
p. 46, lines 2-25
p. 47, lines 1-25 and
p. 48, lines 1-17

Miller deposition:
p. 12, lines 5-11
p. 14, lines 16-25, and
p. 25, lines 1 and 3

Babb deposition:
p. 5, lines 10-25
p. 6, lines 1-3

Hunnicutt deposition:

p. 6, lines 14-25
p. 19, lines 1-5

Lookabaugh deposition:
p. 6, lines 15-18

Willoughby deposition:
p. 10, lines 24-25 and
p. 11, lines 1-4

3. As to the standardization which the defendant desired, it seems that standardization was really applying to the various instruments, such as an opening statement, which any of the judges could use so that those opening statements would be uniform, although the judge had authority to change it, the depositions show:

Eaton deposition:
p. 47, lines 2-25 and there never was standardization because judges had authority to change the order as well as instrument
p. 48, lines 1-25

Miller deposition:
p. 17, lines 14-22 method of working cases never changed but judges had authority to change anything
p. 18, lines 18-25
p. 19, lines 1-24
p. 19, lines 8-13

Hunnicutt deposition:
p. 8, lines 24-25
p. 9, lines 1-4
p. 9, lines 5-25 and
p. 10, lines 1-5 standarization - up to the judges

Willoughby deposition:
p. 12, lines 11-25 and
p. 13, lines 1-18

(indicating judges sometimes change the standard way of preparing the file)

Lookabaugh deposition:
p. 7, lines 7-25 and
p. 8, lines 1-8
(indicating again judges could change any standard way when they so desired)

4. As to lack of supervision by plaintiff in leadership and in planning, organizing, directing and controlling subordinates, the deponents indicate no supervision or leadership was ever needed as indicated by the above headings of the standard way of preparing cases, and standardization seemed to be rather up to the judges. See:

Eaton deposition:
p. 17, lines 11-25 and
p. 18, lines 108
p. 39, lines 9-11

Miller deposition:
p. 24, lines 2-25 and
p. 25, lines 1-17 (hedged somewhat)

Willoughby deposition:
p. 25, lines 20-25 and
p. 26, lines 1-22 (occasionally)

5. As to any communication, leadership and oral instructions, or lack thereof, all indicated they had no trouble in understanding her instructions, except one. See:

Eaton deposition:
p. 31, lines 3-25 and
p. 32, lines 1-21 (sometimes gives more detail than is needed for the particular person)

Miller deposition:
p. 22, lines 11-25 and
p. 23, lines 1-7

Babb deposition:
p. 6, lines 23-25 and
p. 7, lines 1-12

Hunnicutt deposition:
p. 15, line 25 and
p. 16, lines 1-6
No straight answer. (Remark by Evelyn Livengood — remembering, however, this was the Hearing Assistant who wanted the supervisory job, had applied for it, and the one who was promoted after plaintiff was demoted, and was formerly one of the defendant's team)
p. 17, lines 8-15
(no straight answer)

Lookabaugh deposition:
p. 10, lines 20-25 and
p. 11, lines 1-16
(deponent could not specify, but were work oriented)

Willoughby deposition:
p. 18, lines 16-25 and
p. 19, lines 1-3

6. Confusion in respect to office turmoil, moving from one location to another, mental cases and change from unit system to reconfiguration. This is what the deponents had to say:

Eaton deposition:
p. 22, lines 3-25 and
(mass confusion by change from unit to reconfiguration)
p. 23, lines 1-25 and
(telephone and mail duty added; caused reduction in case production)

[APPENDIX]

p. 24, lines 1-8
(pre-hearing review, post-development scheduling)
p. 24, lines 10-25 and
(screened cases for mental impairment at least three times, equivalent to better than 250 cases, caused confusion and reduced overall production)
p. 25, lines 1-25 and
p. 26, lines 1-7
(mental impairment again reducing production and causing confusion)
p. 28, lines 2-25 and
(change from unit to reconfiguration)
p. 29, lines 1-11
(confusion in the change plus move from 50 Penn Place to Main Place, reduced production)
p. 55, lines 5-22
(confusion from the change of unit to reconfiguration and the move, and resistance to the change — conglomeration of everything created chaotic mess)

Babb deposition:
p. 15, lines 1-7
(very chaotic time in move, everything topsy-turvy with reorganization)

Lookabaugh deposition:
p. 9, lines 5-25 and
(lot of confusion)
p. 10, lines 1-9
(confusion in making things work with the move and the change of system)
p. 11, lines 17-25 and
p. 12, lines 1-11
(indicates confusion because Hearing Assistants not working together, but could not say that it was plaintiff's fault)

Willoughby deposition:

p. 14, lines 18-25 and
p. 15, lines 1-25 and
p. 16, lines 1-25 and
p. 17, lines 1-14

(mentioned turmoil from physical move of one building to the next, reorganization, semi-reorganization, reconfiguration, with finishing up prior work, some before move, some after, confusion accelerated, mental cases screening disrupted work flow)

p. 18, lines 1-15

(turmoil mentioned again through 1985 and to end of 1986, and still in turmoil, and turmoil slowed work, along with rechecking and screening mental cases)

p. 40, lines 4-6

(confusion again indicating from p. 39 that plaintiff might not have had ample time to prove herself because of the confusion)

7. Regarding cliques in the office, though not certain, it was indicated that such existed and may have affected plaintiff's performance and could be one cause for plaintiff's removal. See:

Eaton deposition:

p. 14, lines 15-25
p. 42, lines 1-25
p. 43, lines 1-22

Cross Exam

p. 49, lines 22-25
p. 50, lines 1-10

Named: Dorothy Lawson
Debbie Rose
Marge Carmichael
Linda Walker
Janice Hunnicutt
Joann Winters

[APPENDIX]

Shelby Lookabaugh
p. 57, lines 3-25
p. 58, lines 1-25
p. 59, lines 1-11

Willoughby deposition:
p. 40, lines 7-25
Named: Linda Walker
Dorothy Lawson
Marge Carmichael
Joann Winters
Dell Allison
p. 41, lines 1-25

8. Workflow. this is really explained in paragraphs 1 and 2 above where it is shown that the workflow never changed under the unit system and the reconfiguration, and that such workflow was the method of always preparing cases, and this did not change. Also plaintiff, however, prepared a workflow chart and plan because it seemed to be demanded, although it appeared unnecessary because all Hearing Assistants knew their job and could do the job without referring to any chart and plan for help. Then to give plaintiff a 20-case docket (actually 35-case docket) so that she could learn how the work should flow through the component (i.e., Hearing Assistant) when she had been doing such workflow for nine (9) years.

9. In respect to plaintiff seeking counselling, plaintiff was instructed at the beginning that "she had to solve her own problems, even if she had to beat her head against the wall" and told plaintiff not to seek counselling of defendants.

10. Training. Plaintiff claims no training was offered to her to improve if defendant was not satisfied with performance when Federal Statutes provide:

5 U.S.C. §4101

For the purpose of this chapter [5 USCS §§4101 et seq]

(2) "employee" ... means

(A) an individual employed in or under an agency;

(4) "training" means the process of providing for and making available to an employee, and placing or enrolling the employee in, a planned, prepared, and coordinated program, course, curriculum, subject, system, or routine of instruction or education,...technical,...clerical,...administrative, or other fields which are or will be directly related to the performance by the employee of official duties for the Government, in order to increase the knowledge, proficiency, ability, skill and qualifications of the employee in the performance of official duties;

5 U.S.C. §4103

(a) In order to increase economy and efficiency in the operations of the agency and to raise the standards of performance by employees of their official duties to the maximum possible level of proficiency, the head of each agency, in conformity with this chapter [5 USCS §§4101 et seq], shall establish, operate, and maintain a program or programs, and a plan or plans thereunder, for the training of employees in or under the agency by, in, and through Government facilities and non-Government facilities. Each program, and plan thereunder, shall—

(1) conform to the principles, standards, and related requirements contained in the regulations

prescribed under section 4118 of this title [5 USCS §4118];

(2) provide for adequate administrative control by appropriate authority; and

(3) provide for the encouragement of self-training by employees by means of appropriate recognition of resultant increases in proficiency, skill and capacity.

The defendant, as head of the agency (Office of Hearings and Appeals) as far as plaintiff knows, never established or maintained any program or plan for training. Defendant had the duty to make such training available if he thought it necessary. Also, it was the duty of the Supervisor Attorney Advisor to:

> Identify employee training heads by developing training plans and initiate action to ensure that these needs are addressed through formal and informal measures, and to ensure the effective and efficient operation of the hearing office.

> Yet, when we consider that plaintiff was to supervise the type of work she had been doing for nine (9) years, and supervising Hearing Assistants who had been doing the same kind of work for six (6) years, really such training was not necessary and, therefore, in the light of explanations in the above paragraphs, it is evident that all claims made against plaintiff were really groundless and there was no basis for removal as the unsatisfactory evaluation and the claims and evaluation were made for the purpose of removal.

COMMENT: From the inference that may be drawn from the explanation above and reference to the cliques in the office, it appears someone just wanted plaintiff removed, and set out to do so.

11. Fairness. The deponents hereafter have indicated that the plaintiff was not given a fair chance in the position of Supervisory Hearing Assistant because:

Eaton deposition:
p. 36, lines 16-25
p. 37, lines 1-25
p. 38, lines 1-11
turmoil, going into reconfiguration, mental impairment cases, move from 50 Penn Place to Main Place, insurmountable problems

Babb deposition:
p. 7, lines 13-25
p. 8, lines 1-7
no support of Hearing Assistant or management team

Willoughby deposition:
p. 40, lines 1-3
not ample time to prove whether able to supervise

12. Judges' comments as to fairness all indicate plaintiff was treated unfairly and not given any chance to prove herself and inefficiency not her fault, but some note her ability very high.

Judge O'Bryan deposition:
p. 20, lines 1-7
also management determination confusing to anyone
p. 20, line 21
grossly unfair - gave no training, and directions given ambiguous
p. 20, line 25
p. 21, lines 1-9

when things did not work out, pulled the rug out from under her

p. 21, lines 2-8

had outstanding record, given only 6 months and pulled rug out from under her because system was not working

p. 22, lines 13-14

supervisor is only a foreman - they do not make the rules, they simply follow them

p. 22, lines 15-19

tried to do a good job — suddenly first class operation of unit, then general efficiency by change dropped to rock bottom

p. 23, lines 1-6

seemed office run by supervisor staff attorney and hearing office manager

p. 23, lines 14-16

after she was pulled out of office, there was not any improvement — it continued to be bad, if not worse

p. 25, lines 5-10

efficiency or lack thereof not hers — did what she was permitted to do under reconfiguration — she could not have controlled the matter under any circumstances

p. 26, lines 12-14

you could not place fault upon her because of management's failure to provide necessary leadership and instructions

Judge Marrs deposition:

p. 9, lines 22-23

p. 9, lines 25

p. 10, lines 1-2

in position about four months — utter chaos involved in office

p. 10, lines 17-20

no fair chance given because takes too long to initiate reconfiguration and hasn't worked yet

p. 10, line 25
lot of trouble initiating — plaintiff had to initiate a program that had not been tested — that all knew very little about
p. 12, lines 10-25
p. 13, line 1-22
general efficiency has decreased since removal and inefficiency was not her fault

Judge Gossett deposition:
p. 13, line 19
served three months and performance based on that time not sufficient time to fully evaluate her in change of system
p. 13, line 22
p. 14, line 2
no one talked to her as to what function was
p. 16, lines 12-17
Evelyn Livengood proposed a plan of assignment of Hearing Assistants to Judge Thedford, but was rejected, then later the plan was implemented
p. 17, lines 20-25
failed to see how personnel function with respect to preparing cases was fault of Livengood — Hearing Assistants were doing what they had done prior to reconfiguration
p. 18, lines 6-7
lack of efficiency due to reconfiguration rather than Evelyn Livengood
p. 20, lines 17-24
Judge Wampler told Carmichael not to send in unsatisfactory rating
p. 21, lines 23-25
Carmichael had the unsatisfactory rating and disregarded Judge Thedford's statement to Wampler not to send it in

p. 23, lines 10-14

inefficiency of hearing system not fault of Livengood, but Hunnicutt

p. 24, lines 12-14

Hunnicutt has been in position same length of time (as Livengood) and things were no better, and I think they were probably worse

Judge Darks deposition:

p. 9, lines 23-25

says she worked for him until April, 1985, when she was appointed lead Hearing Assistant in reconfiguration

p. 10, lines 1-4

continued to work for him, part time, and prepared a docket for him in Wichita Falls, Texas, then she prepared a 30-plus docket for Judge Thedford (COMMENT: this was one reason why plaintiff did not and could not begin duties as Supervisor on date appointed)

p. 10, lines 20-24

as to ability — she is very accurate, efficient, very courteous and cooperative. I rate her excellent.

p. 11, lines 16-25

regarding efficiency of office since she was removed: Answered - after Ms. Livengood's removal...functioning of the Hearing Assistants... continued to decline until July 1, 1987. The loss of her support and help is still felt by the judges in solving our problems with management. She would try to communicate with us and try to correct problems when (p. 12, line 1) they arose. She also attempted to rotate the incoming cases equally between the judges.

p. 12, lines 3-22

regarding fault of E. Livengood as management at promotion and then demotion: Answer — In my opinion, she was in no way at fault, because office

efficiency continued to deteriorate after she was removed. Obviously, someone else in management was responsible and accountable for the deteriorating system...attempt was made July 1, 1987, to correct this failing system by going to the individual processing unit. I know that communications and exchange of ideas about improving the system has been almost nonexistent between management and the judges since her removal.

p. 10, line 25

p. 11, lines 1-11

regarding his observation and opinion on whether she was given (1) fair chance to prove herself, (2) training, (3) chance to be heard, (4) fair treatment: said — "no" to each

Judge Wampler deposition:

p. 6, lines 8-11

as to her ability as being poor, average, good, very good, or excellent, classified her as excellent

p. 7, lines 1-10

regarding her removal, said: she visited with me telling me that Judge Thedford was about to remove her as Supervisory Hearing Assistant, and that she would be willing to voluntarily go back to being a hearing assistant. Judge Thedford was on a docket. I called him and told him this, and he wanted me to tell the office manager, Marge Carmichael, not to do anything until he returned from his docket. I have no personal knowledge of what happened thereafter. See:

Judge Gossett deposition:

p. 20, lines 17-24

p. 21, lines 23-25

Judge Marrs deposition:

p. 15, lines 9-25

p. 16, lines 1-6, indicating Marge Carmichael disregarded what she was told

Recap of Allegations and Claims

Plaintiff's allegations:

1. Not given fair and equitable treatment;
2. Not given any education or training;
3. Not given due process by denying her:
   (a) Notice of proposed action and grounds asserted for it
   (b) An explanation of the employer's evidence
   (c) Opportunity to present reasons why the proposed action should not be taken; i.e., to present the employee's side of the story.

Defendant's claims in removal letter of 12/18/85:

I. Lacked Leadership

II. Unable to give oral instructions

III. Failed to control organization

IV. unable to give day-to-day assignments of work

Defendant's claims by letter 2/14/86 to plaintiff:

A. Did not seek counselling from defendant
B. Gave her a 20-case docket so she could learn to plan and organize workflow
C. Defendant wanted standardization

In refutation of claims of removal letter of 12/15/85, plaintiff refers the Court to the depositions above under the specific headings:

¶1 All Hearing Assistants worked as Hearing Assistants for at least six (6) years

¶2 Standard way and preparation: pulled cases, determined issues, schedule NEVER CHANGED from UNIT to RECONFIGURATION, and each did the same work under both systems

¶3 Standardization applied to forms such as opening statements and judges could change anything

¶4 No leadership or supervision ever needed and standardization up to judges

¶5 Had no trouble re instructions or in understanding, except one

¶6 Confusion reigned

¶7 Clique existed that may have affected plaintiff's performance

¶8 Explained in ¶1 and ¶2

¶9 Counseling was "solve her own problems"

¶10 Training. None offered, though required by 5 U.S.C. §4101, et seq.

¶11 Fairness. NOT given

¶12 Fairness. By opinions of judges, NOT given and fault was in management, NOT plaintiff

FEDERAL REGULATIONS:

Federal Personnel Manual, Subchapter 9, Probation on Initial Appointment to a Supervisory or Managerial Position provides:

9-5. Agency Obligation During the Probationary Period

a. Training. In order to prepare and equip new supervisors and managers for the demands of the job, agencies should consider the competencies and possible developmental needs of each such employee and provide appropriate training, as well as other support and

assistance, as indicated. See FPM Chapter 412, Executive, Management, and Supervisory Development.

b. Full and fair evaluation. Agencies should establish procedures to monitor new supervisors and managers during the probationary period and to keep them informed of their progress. Agencies have an obligation to give new supervisors and managers adequate opportunity to prove themselves and should direct efforts at helping them succeed.

Wherefore, plaintiff prays that defendant's Motion for Summary Judgment be denied.

RESPECTFULLY SUBMITTED,

s/ Larry Sizemore, OBA #8283
Attorney for Plaintiff
1400 S.W. 89th Street
Oklahoma City, OK 73159
(405) 691-3353

Certificate of Mailing

This is to certify that a true and correct copy of the above and foregoing Response to Defendant's Motion for Summary Judgment was mailed this 26th day of October, 1987, by regular course of mail, postage prepaid, to counsel for defendant:

Ms. Mary M. Smith
Assistant U. S. Attorney
200 N.W. Fourth, Room 4434
Oklahoma City, OK 73102

Mr. Mort G. Welch
Attorney at Law
ABOWITZ & WELCH
P.O. Box 1937
Oklahoma City, OK 73101

s/ Larry Sizemore

APPENDIX N

FILED
August 21, 1987
Robert D. Dennis
Clerk, U. S. District Court
By: Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVELYN I. LIVENGOOD Plaintiff, vs. ROLLIE D. THEDFORD, Defendant. Defendant.	)	No. CIV-86-2314-A

ORDER

Plaintiff's [sic] Motion to Dismiss or, in the Alternative, for Summary Judgment was earlier heard and denied on its first prong. By order dated August 20, 1987, the Court reserved ruling on the second prong, so that there would be an opportunity to develop and present facts.

Plaintiff was placed as a probationer in a supervisory civil service job, with a probationary period of twelve months. Her immediate supervisor gave her a bad performance appraisal about three and one-half months after she had commenced her new duties. Defendant, a higher level supervisor, approved it. Plaintiff instituted a grievance to set aside the appraisal, and did not prevail after lengthy and elaborate proceedings.

As a result of the poor appraisal, she was returned to her lower, permanent position. Thereafter she brought this lawsuit by a complaint that is not "a short and plain statement of the claim...." as required by Federal Rule of Civil Procedure 8(a)(2), (e)(1), but is rather a prolix diatribe difficult to read and interpret. Interpretation here is necessarily done by process of elimination. Because plaintiff alleged no statute vesting this Court with jurisdiction, but invokes only the Constitution directly, and because there is no law under which she has a litigation remedy against the United States, the only conceivable theory of the case is that it is a Constitutional tort alleged against defendant personally, see Bivens v. Six Unnamed Agents, 403 U.S. 388 (1971). The Constitutional violations alleged are deprivation of procedural due process, of substantive due process, and of a liberty interest (apparently based on a "stigmatizing personnel action" theory).

I.

Fifth Amendment based claims arising out of employment may indeed be pursued on a Bivens theory. Davis v. Passman, 442 U.S. 228 (1979). However, in federal personnel matters as to which there is a careful, comprehensive grievance and review procedure, the Supreme Court has unanimously and emphatically rejected any Bivens remedy. Bush v. Lucas, 462 U.S. 367 (1983). If proved, the employer action in Bush would have been far more egregious than in this case; but, nevertheless, the Court answered "no" to what it perceived as the question:

> "Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation

> of a new judicial remedy for the constitutional violation at issue...." Id. at 388.

The rule of Bush has been applied in many cases in lower federal courts.

It would not avail plaintiff to argue that Bush is inapposite to her case because she, as a probationer, was left without civil service protections. First, it is plain that plaintiff's restoration to her former position was but a consequence of her adverse performance appraisal. She could, and did, present a grievance about the appraisal and pursued it tenaciously through four levels of review. Management was upheld every time, but plaintiff had access to a comprehensive system in which, had she succeeded, she would have undercut the basis for her restoration.

Second, at least as to procedural due process, she as a probationary employee had no property right in the higher position in the first place. Walker v. United States, 744 F.2d 67 (10th Cir. 1984). Plaintiff has tried to obviate this problem in her case by pleading that she had had prior supervisory assignments by virtue of which she should not, under applicable regulations, have been made a probationer. In his summary judgment documents, defendant has persuasively refuted that plaintiff had any such prior assignments, and his refutation is not factually rebutted. Walker applies.

Third, and in any event, a Bivens remedy is not available to probationers even if a civil service system remedy is not provided for termination of probationer status because here there are "special factors counseling hesitation in the absence of affirmative Congressional action." Pinar v. Dole, 747 F.2d 899 (4th Cir., 1984), cert. denied, 471 U.S. 1016 (1985); Francisco v. Schmidt, 575 F.Supp. 1200 (E.D. Wisc., 1983); cf. Weatherford v. Dole, 763 F.2d 392 (10th Cir. 1985). Kotarski v. Cooper, 799 F.2d 1342 (9th Cir., 1986) is contra and, in this court's opinion as in the opinion of the dissenter there, is wrong.

Kotarski is also distinguishable because in it the court vindicated basic First Amendment rights and not simple performance appraisal issues.

II.

Plaintiff's substantive due process claim is hard to pin down. Whatever it is, the summary judgment evidence of defendant conclusively refutes that the adverse performance appraisal plaintiff got as a probationer was arbitrary, capricious, or unrelated to any legitimate government interest. This Court is not a fifth level of review on her grievance; nevertheless, upon reading the voluminous grievance documentation, the Court is persuaded that the performance appraisal was a legitimate management function legitimately done.

Plaintiff's liberty interest claim is frivolous. There is absolutely nothing pleaded or shown to the effect that her superiors were responsible for publicizing her restoration to her permanent job beyond the circle of government employees involved, as is required on such claims. Asbill v. Housing Authority, 726 F.2d 1499 (10th Cir., 1984). Also, the law could not be more clear that simply calling a public employee incompetent or inadequate raises no Constitutional liberty interest issues. See e.g., Vaughn v. Shannon, 758 F.2d 1535 (11th Cir., 1985); Hadley v. County of DuPage, 715 F.2d 1238 (7th Cir., 1983) cert. denied 465 U.S. 1006 (1984); Robertson v. Rogers, 679 F.2d 1090 (4th Cir., 1982); Huffstutler v. Bergland, 607 F.2d 1090 (5th Cir., 1979).

III.

For the reasons given above, plaintiff has suffered no Constitutional deprivations, and in any event no Bivens remedy is available to her. But even if the Court is wrong in everything stated in Parts I and II of this order, defendant is immune from liability. He should not have to go to trial. Butz v. Economou, 438 U.S. 478 (1978). Defendant did not commit any constitutional violations as to which the law was clear and ought to have been known to him. This case perfectly fits the

template of immunity from suit itself fashioned by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Defendant's Motion for Summary Judgment is GRANTED. Done this 17th day of March, 1988.

s/ WAYNE E. ALLEY
United States District Judge

APPENDIX O

FILED
United States Court of Appeals
Tenth Circuit
December 1, 1989
ROBERT L. HOECKER
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EVELYN I. LIVENGOOD,	)	
	)	
Plaintiff/Appellant,	)	
	)	No. 88-1632
v.	)	(W.D. Oklahoma)
	)	(D.C. No. CIV-86-2314-A)
ROLLIE D. THEDFORD,	)	
	)	
Defendant/Appellee.	)	

[APPENDIX]

ORDER AND JUDGMENT*

Before ANDERSON, EBEL and HENLEY**, Circuit Judges

Evelyn I. Livengood appeals from an adverse summary judgment and resulting dismissal of her Bivens action[1] against the defendant Rollie D. Thedford. In that action Livengood sought damages for constitutional violations allegedly arising when she was demoted from her probationary position as a Supervisory hearing Assistant within the Department of Health and Human Services, at its offices in Oklahoma City, Oklahoma. The district court held that no Bivens remedy was available under the circumstances set forth in Livengood's complaint. We agree.

This case is directly controlled by our decisions in Brothers v. Custis, 886 F.2d 1282 (10th Cir. 1989), and Hill v. Dept. of Air Force, 884 F.2d 1318 (10th Cir. 1989) (per curiam), applying the Supreme Court's recent decision in Schweiker v. Chilicky, 487 U.S. ____, 108 S. Ct. 2460 (1988). Under principles discussed in those decisions, Livengood is confined to her administrative remedies, including recourse to the Special Counsel of the Merit Systems Protection Board.

---

* This order and judgement has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R.36.3.

** Honorable J. Smith Henley, Sr. Judge, U.S. Court of Appeals, Eighth Circuit, sitting by designation.

1 Bivens v. Six Unknown Named agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

The fact that damages are not available is not material. "Because Congress provided some mechanism for appealing adverse personnel actions, it cannot be said that the failure to provide damages, or complete relief, was 'inadvertent.' " Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989) (on remand from the Supreme Court for reconsideration in light of Chilicky) (emphasis added).

The judgment of the district court is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

APPENDIX P

CONSTITUTION OF THE UNITED STATES:

Article III:

§1. Judicial Power; tenure of office

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§2. Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between citizens of different states, —between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Article V. Amendment of the Constitution

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal Suffrage in the Senate.

Article VI. Debts; supremacy; oath

All Debts contract and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

CERTIFICATE OF SERVICE

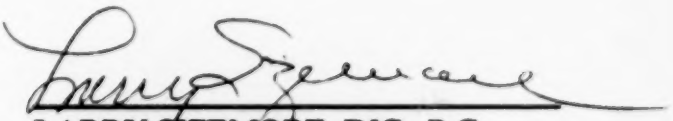
This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed this 23 day of February, 1990, first-class postage duly paid, to respondent's counsel:

Ms. Mary M. Smith
Assistant U. S. Attorney
200 N.W. Fourth, Room 4434
Oklahoma City, OK 73102

Mr. Mort G. Welch
Attorney at Law
ABOWITZ & WELCH
P.O. Box 1937
Oklahoma City, OK 73101

and to:

The Solicitor General
Department of Justice
Washington, D. C. 20530



LARRY SIZEMORE, INC., P.C.
By Larry Sizemore, Attorney
OBA #8283
1400 S.W. 89th Street
Oklahoma City, OK 73159
(405) 691-3353